Lenten Church Note

Vol 9

Reeve, Tapping

Sacra Sacras 1208

Private Bonds 1300

Public Wrongs 1312

Murder 1313 Right of punishment 1314

Persons capable of committing crimes 1314. Opinions 1317

Principals & Accessories 1317 Accessories before the fact 1319

Accessories after the fact 1320. Felony 1322 Misprision 1324

Justifiable 1324. Excusable 1326 Self-murder 1329 Petit treason 1327

Manslaughter 1330 Voluntary 1330 Involuntary 1331

Assault 1332 Arson 1338 Burglary 1339 Larceny 1343

Simple Larceny 1344 Mixed Larceny 1349 Robbery 1351

Forgery 1353 Perjury 1357 Subornation of perjury 1362

Criminal Jurisdiction of our Courts 1363

Bail in Criminal Cases 1367 Costs 1367

Practice of Connecticut ——— 1371

Jurisdiction of justices 1371. & Common Pleas ——— 1376

Superior Court 1382. Court of Trans & Gen. Assembly ——— 1384

Writ & Process 1384. where returnable 1394 & Action ——— 1399

Summons 1399 Attachment 1400 Miscellaneous ——— 1407

Time of making service 1409 – Bail & the officer ——— 1411

Special Bail 1423 – Defense & pleading ——— 1430

Capias 1431 Nonsuit 1435 – Retraxit ——— 1436

Time & Notice 1438 – Changing & altering Pleas ——— 1439

Time of trial 1442 Verdict 1444 Costs ——— 1446

Amendments ——— 1450

Champerty & maintenance ——— 1369

A reassurance is a contract entered into by the assurer - & is void by St - except in a few cases / 2 Saund 203 & n 20 / a double assurance is entered into by the assured & the 1st void he can recover no more than the amount of his loss Burr 492 495

B1 R. 416 2 Saund 204 n 20 -

Policies of Insurance

The magnitude of the premium paid on policies of insurance never amounts to usury – If the repell be insured he only damaged the insurer only insures average or partial loss – 2 Term R 414 & 4 T 786 –

For the distinction between general & partial average see 4 T R 786-8 – Insurance interest or no interest is unlawful 1 T R 304 –

In Eng – there are Stats – against this species of insurance but Mass – supposes that without the Stat – it is void as being against the general principles of the Mercantile law – 2 Mr – 161 – 1 Bl. 461 –

Double insurance are contrary to the law because they create an wagering contracts – But under special circumstances as if the insurer be insolvent or dead re-assurances are lawful –

Is not a second insurance by the insured himself good if the first insurer is insolvent? 2 Mr 161

Re-assurance is a contract of indemnity made between the original & collateral insurer 2 T R 162 –

If property insured be overvalued to a great degree & this can be proved the policy may be avoided – But if freight be insured by an valued policy & a part only of the freight be on board at the time of the loss of the repell the other part being saved the insured may recover for the whole freight unless

The usual memorandum in a policy of ships comes are freed from average unless general protects the insurer from every loss where there has not been an actual physical destruction of the subject insured 1 Johns C 226 16. R 196 3 do 108 16 East 214. Burr. 1550 Marsh. 226 3 Bos 474 7 Johns 529n

2 M. 182
3 Do. 362
Stra. 1183
Burr. 1361
1419. 1405
1 M. 12
5 Do. 580
3 Burr 2084
4 M. 39

One underwriter cannot be a witness for another M. 303. Bull. 282

When the loss appears to be a partial one the assured cannot by their own act turn it into a total one for it is the interest of the underwriters & duty of the assured to make the loss as light as possible 12 Ep C. 74. id 1 Johns 213.

2 Atk. 354

4 M. 208

The underwriter does not in a policy of insurance insure against any loss that may arise from the difference of exchange. 1 B. & C. 77

2 Atk. 359

3 Burr. 1357

there has been fraud in the transaction

When after a reduction of a policy the subscriptions cover the whole ~~property~~ policy any additional subscriptions are void — qu. are the additional subscriptions void if the first underwriters are insolvent?

Any kind of fraud misrepresentation (even tho' by mistake) or concealment of facts which are material will vitiate the policy — but a concealment of mere conjectures or of calculations made from notorious facts will not affect the policy of insurance unless the insured has good reason to believe that the insurer was ignorant of the facts tho notorious

Policies of insurance are assignable with the property insured — Insurances against fire are not thus assignable —

Insurance from a place attaches from the moment of departure. If it be at & from a place it attaches while the vessel is in the harbor —

When ambiguous words are used in a policy they may be explained by the testimony of merchants —

It is a general rule that if the risk insured against become begun the premium is retained — if never begun it is returned

To this rule there is one exception — If the risk be begun by the vessel sailing merely from one port to another which is the place of rendezvous & the voyage be then discontinued a part only of the premium is retained

When a ship & freight are insured at & from & the ship is lost before the cargo is put on board the premium for the freight is returned Semble if the cargo is put on board —

3 Burr 1394
Evans Ef. 8

In order to insure must be done in these cases by
a separate act - 11 - where a merchant owned half
a ship in the hands of his apprentice - 2 where
he has no other if the owner declining to make
claim then that the underwriter is to pay or
for insurance & the other has complied with the
and the other give him notice to discontinue such
dealing - 3. If the merchant ship sailed
leaving to the owner and have to pay a work on
them in order to insure a an implied contract on behalf
the owners of receiving shares to accepter which the other must
due & be entitled to. 2 Vez. 189. 11

Selw. 444
Wes. 98
3 Atk. 195
Stra. 1165
1 Ch. 187

2 of 3 Pltf were owners of the Ship insured & all
were in Copartnership & owners of the cargo it
is a suff. interest in these to maintain an
action on the policy 1 Ch. R. 574

Stra. 1265
2 Ld Raym. 747. 22.
2 Do. 32

Ce concealed particular interest contrary to usage ought
to be disclosed to the underwriter at the time insurance is
made 7 Term 526 2 do 346

Doug. 16
1 Show. 324

Doug. 34-16
2 Ld R. 32
Evans 64
Chitty 17

The obligee in bottomry bond may insure the property which is a security for his bond - but he must specify the amount of his property hazarded & the certificate -
According to the current of authorities parol evidence may be admitted to contradict a policy -
When all the salvage does not amount to more than the freight the insured may abandon the property to the insurer & recover for a total loss - Semble the insured cannot abandon upon time can never be an abandonment unless an between the assured & insurer the loss is total
If a ship be taken the insured may abandon & if she be retaken she may also be abandoned before she arrives in port - but not afterwards unless the salvage is as small as the freight
If the off-fact in an action for a total loss he may still recover in the same declaration for an average loss. 3 Burr 1934 -
When the insured loses the benefit of his policy thro fraud he may recover the premium -
If a ship insured be lost thro ignorance or fraud of the pilot the insurer is discharged
A voluntary deviation from the course of the voyage discharges the insurer - but if a deviation be made in search of a convoy after separation or if it be occasioned by unfavorable weather the insurer is not discharged by it 1 Bl 22. 747
When there is a manifest intention to deviate but the intention is not executed the insurer not discharged Park 444 2 Ed 21. 343 - 4 T.R. - 581 Pha 1249 -
But if a vessel insured for one voyage actually sails on another & be lost even before she arrives at the deviating point the insurer is discharged
The insurer is not liable for losses by theft, robbery or capture - By

2 Str. 15
Willes. 60
Show. 362

Whatever is written in the margin of a policy of insurance is a warranty & must be literally complied with. 1 Bro 345 b Lord Doug. 11.

Salk. 443
Str. 1265
Burr. Jn. 539.

Str. 693
1236

The neglect of the Captain in not securing his crew is barratry Str 681. Comp 133 / Ld Qu Is it barratry if the Captain neglects for the accomodation of the owners in Str 1172 - 1264. Lewis not especially if with the owners consent / Comp 153. 154 / Ld Qu if for his benefit only & not with his consent -

2 Roll. 248
Str. 1109
Burr. 1155

1 Str. 85

Burr. 683
883

Barratry can only be committed against the owner of the Ship & without his consent - 1 Bro 130 Comp 154

1 Str. 73

theft in policies of insurance is meant piracy -
A merchant abroad having effects in the hands of his correspondent may compel the latter to procure insurance unless the insured strictly perform every stipulation of his the insurer will not be liable -
If the contract be to insure the voyage with "a convoy" the whole voyage is to be performed with convoy unless prevented by accident - Lowe - Weatherfe - pu - 2 Y. & M. 551 -
Hanger trading with an enemy is illegal in a subject see 1 R. 84
Insurers are liable for loss occasioned by quarantine -
Goods taken out of the wreck by direction of the owner of the goods & put on board of his lighter are considered as landed in an action against the insurers -
The "usual perils of the seas" comprehends all damages from the waves & tempests &c -
It is an established rule that if a vessel be not heard of in 4 years the insurers are liable & if after this the vessel returns the premium is to be restored - This period of 4 years appears to be too long in case of short voyages -
As a policy on neutral property the bound to an enemy is void.
An insurance against enemies does not extend to pirates - But insurance against "capture at sea" extends to captures by pirates
When an insured vessel has been captured & immediately escapes or is ransomed the insured cannot recover & some report the insurers for a total loss unless the salvage be as much as the insult -
A promise by the Captain on the part of the owners to pay wages to a seaman for learning a hurtage in case of a rancorous binds

Seamen's wages & provisions are not covered by an insurance on the body of the ship during an embargo. 1 Ch. 127. / for in order to recover upon the policy the loss must be a direct & immediate consequence of the peril insured & not a remote one. 1 Ch. 130. 1. 2 n. ind 1 Ch 132. n

If a ship be arrested in port 24 hours & is then seized on account of the master's smuggling, ~~during~~ the voyage the underwriter is discharged 1 Ch. 260. 1

Stra.	1173
	1264
Cowp.	143
Term.	328
	=
1 R.	252
3 Do.	277
4 Do.	57
	±

Sia. 246

Sum. 822

the owners -

Barratry discharges the insurer - But the criminal conduct of the mariners does not discharge the insurers tho it occasions the loss - Law merchant.

Barratry may be insured against by express stipulation - 1 Ld 259 -

Embargo is a common hazard 2 Ld 100 -

Insurance for silence in smuggling in a foreign country was once determined to be legal - But this decision is exploded & to be disapproved -

Law of Chartering

If a freighter vessel be lost the owner of the cargo is not liable for freight - this rule is often superseded by express terms of the contract

What constitutes a bill of lading see 1 Ld 131 - 159.

If a certain freight is to be paid on an outward bound voyage & a distinct price on the homeward bound & the vessel be lost in returning - the owner of the freight is liable for the freight in the outward bound voyage - & if in this case the vessel instead of being lost return not freighted the party whose fault it is that she is not laden must bear the loss -

If the cargo be insured, the insurance moment of the master the owner of the property is not liable for the freight - but he may recover the property of the owners of the vessel in damages - The rule is the same if the injury occasioned to the property be in consequence of the ill state of the vessel - The owners of the cargo may in such case abandon to the owner of the vessel - but he must abandon the whole cargo or none at all -

An account for the collection of debts in my factor's Branch 1834
Sept 1827. in.

Burr. 288
882

1 Pl. ---- 18.18

Cook. --- 630
1 Pl. --- 23.108
2 Ver --- 643
1 Pl. Al. --- 119
1 Vent --- 196
--- 238
=

2 Pl. ... 606
2 Ver ... 728
1 Cod ... 129
1 Burr ... 844
Sp. Ray 1212
1 Pl. --- 79

2 Pl. .. 606
3 Vir --- 8

Sept 1827

If a freighted vessel be taken the owners are entitled in compensation to a part of the freight proportioned to the part of the voyage performed & the property carried - this the freighter may abandon -
A penal charter is void unless earnest money is paid & if after payment of earnest the freighter retracts he loses double the earnest -
Losses occasioned by the misconduct of the master are borne by the owners of the vessel - & by stat - in this case the owner is not liable to a greater amount than the value of the vessel
The owners of a vessel are liable for necessaries furnished him on the credit of the master & thus the vessel is let out for any length of time - The master is also personally liable in this case -
As to the wages of mariners the law merchant governs - The wages are payable at every port of delivery - They are lost by the loss of the vessel - forfeited by a rebellion against the master unless the rebel "sincerely repent" - by wilful absence which occasions delay & in all cases by leaving the vessel before she is discharged of her loading -

A seaman disabled in the course of a voyage by accident so as to be unable to perform duty, the whole voyage is yet entitled to wages during the whole voyage

Factors

A factor is a person who is employed in a foreign country to transact any business for another - If he is expressly authorised to sell goods in his own name or if he is not authorised then

So too they are included as creditors foreign & Ins 838 & 1 Bro PC 289

An agent for the collection of debts is no factor & Franck 434 & 1 East 28n

P. factor has no right to charge his principals goods & he does the principal & 150b
may recover the value of them & pounce in trover or trover instead of the factor
that is due him without tendering to the pounce. Hen 1178 5 T R 502
Rocco 340 Selw 828. 1 East 149

Sed that a factor may sell an ass. it (Hill. 40b 3 Bos 489) the act preliminary
of the ass. so to do — his agent authorised to do any particular act can do it
only in the usual way Stevens & Stevens 1 B 258 See also Rocco 340 Point
in gt the £150b

the rule is the same in all such cases where liable only to the factor —

The factor has a lien upon the goods he has in his hands of his principal's to the amount of his account — Amb. 252. 1 Burr 494

On the death of the factor if the principal's money can be specified the Exr. &c has nothing more to do than to pay it over to the principal — but if the money cannot be specified the Exr. &c is liable to the amount of the goods sold —

If the factor become a bankrupt & the money cannot be specified the principal stands in the place of a creditor & comes in for a distributive share of the property — 2 Wall. Jr. Rep. 350 Edw. 830.

But if the factor is known to be such the creditors are liable to the principal & in case the factor is defrauded a subsequent discharge by him will not cover them & but in all other cases a discharge by the factor is good —

A factor differs from other servants in this; that he may be employed & trust at the same time & is generally paid by commission — Russ 89 — 6 Ves Jr 255 —

P. A bare commission to sell does not imply a right to give credit

A factor is under obligations to account with the utmost fidelity for if he receive his own & the goods of his principal he must apply the first money received to the payment of the principal — Salk 202 — 2 Mod 100 —

If the factor suffer by the breach of the principal as by having damaged goods imported upon him the principal is bound to make reparation to the factor for the damage sustained by the imposition — So the factor's factor may maintain an action against either the principal or factor for sums

Receipt of profits suff. 2 Ves. C 470 an So if one suffer his name to be in a firm tho he receive no part of the profits or sustain any part of the loss 15 Ves. 200 So lending money to a firm if to receive a certain proportion of the profits in lieu of interest suff. to constitute one a partner Pole 80.81

Doucy 356
374
2 P.W. 402
2 Mal. 245
1 Ves. 95
2 Camp. N.P. 45

"Not profit" may or may not exclude the interest of capital from the calculation of profit 8 Co. E. Ch 443

Falk 444

5 Term 433

in position Sodd - 194-

A letter to amount to be such as not make the ~~[illegible]~~ ~~[illegible]~~ purchaser liable if he squander the money received of him Ibid - 198-

If a factor does not permit his commission he forfeits his factorage Ibid 182 -

If he is directed to insure & neglects to do it & the vessel is lost he is liable - 8 Q Nos. 886 - 2 Bl. 1188 n.

Law of Partnership 1267 0

To make a man liable as a partner there must either be a contract between him & the ostensible partners share jointly in the profits & loss or he must have permitted the other to make use of his credit & to hold him out as one jointly connected or answerable with himself ibid. 2 Johns. R. 331.

The property of a deceased partner rests in his Exr but the surviving partner has the right of suing to collect the joint debts or property & in his hands is - this right he has however under a liability to account with the Exr of the deceased -

A surviving partner may join in one declaration a demand accruing to him as surviving partner & a demand accruing to him individually -

Partners are bound for partnership property

A judgt. agst one of several partners extinguishes the debt
agst the others 5 Hill 82. 136

If one of two partners become bankrupt the solvent partner
may if for valuable consideration without fraud dispose of
the partnership effects & he afterwards sell the effects
under the joint commission against both cannot maintain
trover against the bona fide vendee. Cowp 448 a. in Litt fo 323
1 Brnt 2/01 1 Bal 290 between as tenants in Com
between whom trover does not lie

P.W. 582
2 Bl. 24

Sol. 444
Cowb. 444

Partnership is dissolved by the death or insanity
of one of the partners 15 Johns 57

Where a genl. partnership exists & money is borrowed in
the name of the firm all the partners are liable
they are presumed to the use of the one borrowing
5 Mand. 223

Wms 264
1 Eq. Ca. 8

per se, & per tout — Ves 364 & 4 Ves 89

For the difference between partnership & such property a contract see 1 Ves 89.

If the surviving partner be unable to satisfy the damages against the firm the Exr of the deceased partner is liable & in this case it has been customary to file a bill in Chancery against the Exr but J. Reeve supposes there is no necessity of resorting to Chancery & then M.

If S. & H. trade in separate houses under an agreement to share in each other's profits each is liable so far as it respects third persons for the other's debts tho there is an express stipulation to the contrary — Pang 271.

It has been said that a surviving partner has the absolute control of the joint property. — If such this very erroneous for an absolute control of the property seems to amount to a complete ownership — the true rule seems to be this — that the property vests in the Exrs & that by reason of the inconvenience of joining the Exrs & survivor in one suit (since in this case one would sue in his own right & the other in right of his testator one would be liable to costs & costs & the other not) the former is vested with the right of collecting & receiving of the joint property as survivor in action —

If one partner be charged beyond his proportion Equity gives a lien on the partnership effects

When partners become bankrupts the mode of settling the estate is to apply the joint property to the payment

A partner is not permitted to deal on his private account that is obviously at variance with partnership business 1 Sim & Stu 133

An exn. agst. one partner for his individual debt can take only his interest in the partnership funds subject to the accounts of the partnership 2 Ch R 514. & separate creditors of individual partners may also claim priority of payment out of their separate effects 3 Pairge 527. 167 4 Ves 396 — 2 Ph 485.

A agrees to work B's Ship for 1/2 the the net profits this is a partnership 1 Campb 330 / Semble if he is to have 1/2 the gross earnings of the Ship — id — more contract of hiring — id also 2 Camp 97 2 Saund 49. 10 Johns 226 4 East 144 4 Esp 182 — 1 H.Bl. 155 / 2 Do. 618 / 1 Ves 366 / 2 Ves. 279

Where a partner borrows money on his private acct & afterwds applies part of it to company purposes held that the lender has no claim agst the company 22 C.L. 382 — 1 Show 173 / D. Ray 871

Comp. 636 / 1 T.R. 125 / 2 — 727

of the partnership or company debts & the private estate of the partners is the joint income to the payment of their respective or individual debts - if there be a surplus of private property it is also liable to the company debts - & if there be a surplus of joint property & a deficiency of private remnant of the former as belonged to any one of the partners may be applied to the payment of his private debts but not to the payment of the private debts of any of the other partners -

One partner cannot recover by indebitatus assumpsit a sum of money received by the other on their partnership account unless there be a balance struck - seems if the money received be not partnership property -

After dissolution of partnership the partner entitled to receive & pay the debts &c - cannot bind the others by giving a security in the name of the firm as before the partners became entitled to their property ~~[illegible]~~ both joint & private is liable indiscriminately for every debt both joint & private - qu - If one of the partners be indebted in his private capacity can any more than his joint part of the property be taken in execution for the payment of his private debts? & more than his part be taken can it be sold on the execution? No. A sale of his part under the execution makes the purchaser a tenant in common with the other partner -

If one of several partners contract as for himself - that is - without discovering the partnership proof of this fact tho it was unknown at the time of the contract to the

In an action by a firm the name of a dormant partner ought not to be used for he is no party to the contract except as a deft. ie. to be made liable for the debts of the firm 4 Mand 629 2 Esp 468 1 Esp 7 T.R 361 2 Bacon 324.5. 1 Ch. Ca. 3 Lev 84

+ 2 Bos & P. 525 1 Bul. 126 S.R. 175 S.C. Kirby 170

The partnership being established the party claiming not to be liable for an act done in the name of the firm must shew that it was done by the other partner on his separate account & without authority this fact being established the creditor must shew that he had no knowledge of the want of authority 7 East 212 13 do 175 8 Ves 540 4 T.R 251. 262 2 do 300 2 B.R. 246 = 7 Mand 158 that a partnership ~~note~~ name subscribed by one of the firm without the knowledge of the other as surety for a third with the knowledge of payee cannot be enforced agt. the firm 16 Johns 34 & 19 154 1 Mand 529 7 do 309 signing "as surety" is suff. to put the party on enquiry

Plea in abatement for non joinder of other partner held suff. for Off to prove that he had reasonable ground to believe that debts alone constituted the partnership the only question in such place being to whom was the credit given 1 Barn & Adol. 398 overruling 5 Bacon 609 - 3 Law Lib. 341

third person contracting will render all the partners liable 1 Ld Raym 458 Peake 80. Kirby 147 1 Bat 292 2 Vern 292. Caines 184. A contract made by one of several partners relating to the partnership business binds the rest — & And even after the partnership is dissolved a contract then made will bind all unless public notice of the dissolution be previously given. Salk 292 & 293 Cowp 449.

So the act of one partner shall bind the rest though not done on the Partnership account & the other partners know nothing about the transaction (Peake 80 Kirby 147) & even though on his private account if done in the usual course of business 1 Bat. 292 2 Vern 277. 1 Caines 184.

One partner cannot maintain an action at law against his Copartner when there has been no settlement of accounts & premises by Deft. to pay the balance 14 Johns 321 see 2 Bos 268 270 1 East 20 2 Johns 4 . relief in Chancery 14 C.L. 68 27 do 247.

One partner cannot without the other consent introduce a third person into the firm 14 Johns 322.

Partners

Joint owners or Partners are not entitled to charge each other for services rendered in the care & management of the joint property unless there is a special agreement to that purpose 1 Stark. 94 1 Johns Ch 165 –

If one partner takes out of the joint stock money & purchase land with it to his own use this land is not to be considered as joint stock the other might do the same & the land so purchased by him is his separate estate – each in such case is debtor to the partnership for the amount taken from the funds – it is considered as a division of the joint stock pro tanto 11 Mass 475.

An assignment by one partner in the name of the partnership of the partnership effects is void 5 Cranch 289

One partner without the assent of the other cannot make a general assignment of the copartnership effects to a trustee for the benefit of creditors giving a preference to some & not others 5 Pick 30 see 3 do 587 –

One partner cannot bind another by retaining an att^y or commencing a suit 8. Cond. R. 6th 127.

A debt due a firm cannot be distr^d by one of the partners applying it in satisfaction of his own indebtedness to the partnership debtor 7 Mend 326. 2 Caines 246.

Each of the partners has an equal right to the pers^l of the partnership effects & to collect & apply them to the partnership debts & where either have a right to decide upon a bill filed by either to settle the partnership concerns it is of course that a receiver is appt^d 2 Paige 310.

An action cannot be sustained on a breach of an agreement to procure a partner without proof of the specific terms of the intended partnership 14 C & L 170. qa must not those terms be set forth in the decl^n?

If pending a suit in Chancy Pltff. parts with his interest
do the proceedings abate? 4 Mass. 654 4 Nos. 347 5 Mass. 20

Powers of Chancery

General powers of chancery not easily defined. Mit. 5. 8 Pl. 429.

Lord Keimes description

1. To abate the rigor of the C. L.
2d That it decides according to the rule – not the letter
3d It is said that fraud, accident & trust are peculiarly cognizable in Chancery. 1 Ro 1384. 10. Mod 1.
4th Not bound by precedents or rules –

As to the first they have no such power 3 Bl 430 & Hardcastle – formerly before 3 & 4 W. & M. – of land creditors whose debtors devised away their real estate. 3 Bl – of land devisees inherited not now liable to simple contract creditors – That of fathers shall never inherit &c – Only blood excluded from inheriting &c – 3 Bl 378 2d 208 – 43 – 7 –

Equity cannot change agreements the parties – 2 Atk 239. 3 Bl 435 –

2d Deciding according to the spirit – & so must a court of law – the rule of construction is common to both – & the same rule as to construction of contracts. 3 Bl. 431 – 8 – 1 Ch Dang – 264

3d Fraud – accident & trust — But fraud perhaps of every kind is in some way or other cognizable in courts

of law – sometimes exclusively – as obtaining a decree – Powell – 491 – 1 Ves. 257. 548 2 Atk. 177. 544 –

Many incidents also – as loss of deeds – mistakes in accounts – 5. Ch. 74 – 3 T.R. 151 –

Contingencies which render the performance of a condition impossible – some not relievable in Equity – Ex – devise ill executed – Contingent ~~rem~~ remainder destroyed &c.

Frauds are generally cognizable in Equity only – not always – Ex – Bailments – money lend & received to another use – 3 B. 481 –

Will an action on the case at law ever lie for the violation of a trust in Chancery? Rob. F. Con. 522 – Rob. 267. Eq. Ca 384 – see 2 Atk. 312 –

Case lies in Ct. for forging of a note against promisor for taking a release after notice –

Chancery will sometimes aid a title defective at law 1 Root 105 – 2 Root 209.

Mistakes in written instruments generally aided in Chancery only. 1 Pow. C. 433 – 2 Atk. 31. 203 – 2d 389. 1 Ves 318 1 Bro. Ch. 341. 2 Ves. 376 – Reily 399 – 1 Root 105 – 94 – 2d 178 – 415 – 99 – Sandf. as Washburn – St. E 1803

4. Precedents &c – Courts of Ch. are governed by precedents – Ex – repugnancy wife her dower in trust estates, yet allowing the husband mortgage – distinguishing between a mortgage at 5 per cent with a claim of

The Court of Law will take notice of & protect the rights of the assignee 17 John. 391

A surety when a debt becomes due may come into a Court of Eq: & compel the creditor to sue for & collect the debt of the principal 17 John. 384 2 John Ch. 554. 564

It is a good defense for a surety that when his principal was solvent that he requested the creditor to collect his money of the principal & he refused so to do until after the principal became insolvent. 17 John. 385 for if the creditor does any act injurious to the surety or omits to do any act when required to do it by the surety which his duty to the surety requires him to do & the surety is injured by such omission he is discharged 17 John. 384 13 do 174

If a court of Equity has once had jurisdiction it will insist upon retaining it tho, the original ground of jurisdiction no longer exists 1 Mac. & Ch 23. 3 Bro Ch 218 17 Johns 388 9 Ves 1464 7 do 19 1 Atk 126

substituted 4. & vice versa — Where are pertinences found the precedent. Mit. 4 n

Blackstone's distinction — "principally" in the modes of administering justice — 1 Proof — 2 of trial — 3. of relief —

1. Of proof — Compelling discovery from a party, under oath — Appeal to the party's conscience for facts resting in his knowledge — 2 Bl. 384. 437. 49.

Hence Chy. concurrent jurisdiction in matters of account (as incident to this) in the concerns of administration — Legacies &c & their judgment is the same in Equity as at law — 2 P.W. 145 2 Ver 277 3 Bl 437.

2. Trial —

In Chy. by interrogatories on which depositions are taken out of court — Not so in Ct. in common cases —

When witnesses are about to leave the kingdom — aged or infirm — depositions de bene esse are taken by a commission granted to perpetuate testimony — In consequence of this power to take depositions Chy. exercises the jurisdiction which would be exercised at law could the witnesses attend. 3 Bl 282 — 383 — Mit. 130 —

3. Relief — Specific — even case of specific agreements to sell or purchase land — considering as done what ought to be done. 3 Bl 438. Eq. Ca Ab — 3 Ch. 215 — 1 Fonb. 1113 — 1 P.W. 532 —

Want of specific remedy at law gives Equity a concurrent jurisdiction in many cases where damages are recoverable at law

Injunctions against waste - prevention - Decree to prevent multiplicity of suits - vacating contracts for fraud 3 Bl. 438. 1 Ves 208 -

Courts of Law & Equity differ in these three respects to time but they also differ in others also - Ex. gr. At L. L. the whole penalty of a bond is recovered on forfeiture - in Equity the sum really due. 3 Bl. 439. 4 -

Case of mortgage -

equity of redemption -

When a contract has been legally executed the fraudulent in the consideration courts of law must give judgement in favor of it - But Equity will decree performance in case of any fraud or unfair advantage & will event set it aside 2 Ld. 422.

Trusts as contradistinguished from legal estates is another source of Jurisdiction. 3 Bl. 439. 2 Ch. 645 - 68. 9

Besides Blackstones distinction perhaps a distinction near the truth is that Chancery may 1. enforce justice when positive law is silent 2 - may abate the rigor & supply the defects of C. L. when such rigor &c - are collateral & unforeseen consequence of the rule of law - Law is it be a direct & obvious consequence of the rule & if the rule seems designed for the case which it literally extends - Ex - Injunctions to stay waste - marriage settlement agreements - specific agreements generally - Mit. 3. 4 - 103 -

Agreement to give a mortgage deed - by mistake executes absolute Chancery will relieve & treat it as a mortgage - If Parol proof is admissible to show this agreement. Prec 140. & a mistake in an instrument - is always a head of relief in Chancery. 3 Atk 358 389 Prec Ch 309 2 Atk 31 2 Ves 376 1 Root 404 2 Ch 78 1 Br Ch 341 1 Ves 459 318 1 Vinly 399

That a trustee cannot become the purchaser of the trust estate Vid 13 Johns 222 1 Barnes & A. 21 unless by the consent of all in interest 3 Paige 178

An appointment to pay debts in a particular order by mistake of the scrivener A's debt was made payable before B's when his directions were to make B's payable first - upon B's application to Chancery to have this mistake rectified & have his debt first paid the Court refused to interfere 17 Alp 324 Dwight vs Pomeroy & vid also 2 Pet C. R 517 & 1 Pet. R 1.

Where equities are equal Chancery will not take from either their legal title 3 Ct. 152.

Power of decreeing specific performance exercised in Ch^y from the time of Ed-4- Cro Eliz 551. 1 Ford. 2^d 2 Pow. 65-6- Contest between Ch^y & B.R- in the time of Ja-1. 1 Roll. R 384.68 This power was soon after established & the exercise of it was common in the 2^d year Ch-2- Lectch 172-

Marriage settlement agreements made before marriage specifically decreed in Equity -1 Ford-88-93- Tho the general rule at law is otherwise 1 Vt-442- Cro E-551-

So if the instrument be a bond to make a settlement either during or after coverture - it is considered an agreement - Equity extends to the substantial object- 1 Ford- 93- 2 Pd 243- 2 Ver 480- 2 Atk- 97- 1 Pow- E-316-

But a bond was formerly holden by some to be void at law whether perfected during or after coverture Ver 480 Co R 575- Hob-216 Lev 325-

A bond perfected after coverture is good at law 5 Ja- 381- 1 Pow. E-242-

If such a bond were payable during coverture it would be void Lev. 325-

Formerly if agreements were made between husband & wife during coverture they would not be enforced even in Equity but thro the medium of trustees. Co L 3- 1 Ford- 94- 2 Ver- 385- 2 Atk 72-

So also thro the medium of trustees

the wife may dispose of her property as a feme sole - Not so at law - 1 Ver. 244 - Pam. C. 444 - 2 Ver - 191 - 665 - 1 Bl 442 Co L - 112 -

These courts of Law & Equity seem to act on different principles - Day 221 -

But such agreements be if merely voluntary & unaccompanied with any indications of fraud are not valid against creditors or purchasers 1 Ferr. 95 - 6 Ch. 22. 3 Co 339.

But its being merely voluntary (that is) in this case without valuable consideration) is not conclusive evidence of fraud - 6 Ch 22 - 1 Ferr. 261 - Cow p - 708 - 1 Atk 15 - 2 Bl. 297.

Husband being indebted is a badge of fraud - So a power of revocation - or if the conveyance is of the whole or greater part of grantor's property - 1 Atk 93 - 1 Ferr - 262 - 94 - 8 Co 82 - 2 Ver - 510 2 Bulst - 218 -

But voluntary agreements are binding on the party himself & his representatives. 1 Ferr - 262 - 1 Vern - 132 464 - 76 -

Equity reverts to the substantial object of all contracts & gives effect to that - not regarding form - Ex - bond treated as an agreement -

So in Eng - If one of co obligor pays the whole Equity will either compel the other to pay or if the action is not against him by the payee of the bond will

In the administration of legal & equitable assets Chancery will not disperse any creditor of any legal preference he may have to the legal assets yet if he has rec.d payment in part from them he will not be permitted to receive any of the equitable assets until the other creditors have rec.d dep.t of them to put them on an equality & then all the creditors will receive the residue rateably 3 Peere 171. Ball & B. 220.

A partnership creditor is entitled to all the partnership effects & the individual creditor to all the individual estate 3 Peere 171. So of joint & several creditors 2 Vern 706 3 Ves 238 (240) 1 Glyn & Jam. 309 9 Ves 118 Neither can take the fund of the other until that other is paid

restrain him from pleading the payment by the co obligor
— considered as an agreement between the obligors
— 1 Pow. C. 315 — 2 Ves 371 — 2 Bl. R 949 — 3 Bac 701

~~debitatus assumpsit~~ Will not indebitatus assumpsit for money paid to the other's use as in Ct. Lee 2 Bl. 949. 3 Tr 423 — 8 Ves — 166 . 3 Bac 701 — Edward 164

Equitable interposition extends to all cases in which the subject of the contract or the parties are within the jurisdiction of the court — for it acts as well in personam as in rem — 2 Pow C. 8. 9. 1 Fonb. 31. 1 Atk 19. Mitt. 184 —

Meaning that when the matter in dispute is such as to require the interposition of Equity. Ch^y will take cognizance of it if either the subject contracted about or the party bound is within the local limits of its jurisdiction — Ex. Deft within the realm — the land which he agreed to convey beyond sea — Here the decree acts in personam — by process of contempt & sequestration of goods — 2 Ves 494 — 1 Ves. 204 — 447. 54

Formerly Ch^y courts act only in personam — not in rem. Now it can act in rem by issuing process to put the party in possession of land within its local limits by injunction & writ of assistance to the Sheriff — (that is) injunctions to Deft — to deliver possession & on his refusal a writ to the Sheriff ordering him to aid & assist in putting the Pff into possession — 1 Fonb 31 — 2 Pow. C 8-9 — 3 Atk 275 — 557 1 Ch 548 — 1 Ves 454

The practice of acting in rem first began in the reign of Jac-1- 1 Ves 454- 1 Ford. 31-

Gen- rule that Chy will decree specific performance of agreements improperly falling within their jurisdiction in those cases in which courts of law will give damages for non performance - 2 Raw. C- 14-16- 1 Ford 139 2 Freem. 217 Ea- Ch- 67. 9- Ame-406- 1 Atk 31. 327-

Hence it will not enforce a voluntary agreement or even covenant under seal. 1 Raw- 341 242 1 Eth 10. Stra 758. 1 Ves 450. 74-

Exceptions on both sides of this rule- first- performance not always decreed tho damages might be recovered at law - 2d Bill to have a conveyance of land - it is no lien against a bona fide purchaser for valuable consideration without notice. 1 Ford. 359. 18 W. 429. 283. 2 Com 138 1 Raw C 161

But an agreement to convey on valuable & adequate consideration is good against mere legal notices - Lands if the consideration is very inadequate tho damages may be had at law - no decree in Chancery 1 P W 282 2 Raw C 61

So where the bill is to compel the Deft - to execute a conveyance & to pay the consideration Equity will not decree if the Pltff title is under embarrassment - not immediately removable tho damages might be recovered at law - 1 Ford 138 2 Ch 201 2 Raw C 84

A purchaser for a valuable consid. without notice
may lay claim to a discovery which is to destroy
his title provided he sets up this defence in his answer
& fully denies all circumstances stated in the bill which
go to charge him with actual or constructive notice
of Petitioners equity — But deft. cannot by answer object
to the discovery of particular facts in the bill & then answer
there fails in part without overruling his own objection
3 Paige 188 Mt. 30 Jun — & if he submits to answer
at all he must answer fully

So if one agree to sell land of another - no decree - yet damages are recoverable at law - 1 Pow C 161 -

Exceptions

where Chancery will decree tho no damages can be recovered at law - Ex - land devised by a feme covert to convey land to her intended husband - destroyed at law by the intermarriage - so no damages - yet a good agreement in Equity - So also if the feme sole were an infant if the agreement were with the approbation of her parents or guardians & upon good consideration 1 Pow C 16 - 254 - 2 P.W. 243 - 1 Ford 68 - 2 Atk 607

So where one lends money to an infant & with which the latter buys necessaries - 1 Ford - 68 - 1 P.W. 558 - 2 Ab 283. 5 Mod 308 - 2 Pow. C 258 -

So where the obligor of an assigned bond takes a discharge of the obligee after notice - So also where the agreements arise under the acts of a court of Chancery as by Ex - a judicial sale of an estate - or purchase before a master - tho no damages are recoverable at law - 2 Pow C 14 -

So where the condition of a bond is destroyed by the obligee's becoming Ex^tr to the obligee. 10 Mod 515 - Gr 62 - 2 Pow C - 254 -

Powell states the distinction betwen cases where Equity will & where it will not decree specific execution when damages cannot be recovered at law to be this -

— If there is a good agreement in existence but which is inoperative at law by reason of a formal defect Chancery will decree — Ex. Case of an infant bona fide sale — Ante — 1 Ld. Ld. 243 — 3 Atk 607 —

But where the agreement is ineffectual at law by reason of the not happening of the events as provided for by the agreement Chancery will not decree — Ex — Husband covenants to settle &c on the death of the mother & his coming into possession & he never comes into possession — performance not decreed — 2 Ban & Ch. 1 Ves 256

Powell also seems to consider the rule "that where no damages can be had at law no decree &c" — universal — so far as relates to jurisdiction & which enables Chancery to carry agreements into specific execution — The true ground hereof, which induces Chancery to decree in such cases is founded on its appropriate jurisdiction — over trusts fraud and accident — Ex Religious licensing Exr to oblige — mangin the obligee &c — 2 Ban 254 —

General rule that if a man can damages at law would be an adequate remedy, equity will not decree specific execution — 1 Fonb 28 — 139. 2 Br Ch — 241 —

Chancery will not decree specific execution of personal contracts — respecting personal property — in general for in such cases courts of law can give us complete remedy as Chancery can and

damages are not to be ascertained by the Chancellor's conscience
- But cases of this kind depend very much on their special
circumstances - 1 Ves 449. 2 Paw. C 215 - 2 Eq. Ca 19. 1 P. Wms. 570
Bunb. 111 -

Where the ends of Justice require specific
performance & the party wishes it chancery will
decree - as if the contract be to perform something
relating to the personality at several times - Ex. Ca
covenants to save B harmless & to stand in his place
as to performance & contingencies to a third person - Decreed
that it be performed in specie - 1 Ves 189. 2 Paw. C 215 - 1 Ves 449
2 Eq Ca - 19. P. 393 - 2 Ves - 305 - 4 Atk 383 -

So an agreement
for 800 tons of iron to be paid for by installments
- So sale of timber trees, 4 Atk 383 - 1 Eq Ca - 393 - 1 Ves. 201

- Another Exception to the Gen. Rule -

Where fraud is mixed with damages - Ex - A bringing covenant
broken at Law - B files a Bill for injunction for fraud - A files
a cross bill for relief on the covenant - If the covenant is
established Equity will direct an issue & decree the
damages - 2 Paw - 216 - 1 Eq Ca - 17. 1 Ba 69. 526 -

So if a bill
is brought on a covenant of a personal nature & the Deft
does not demur to the relief but files an answer
Equity will decree for its jurisdiction - is admitted -
2 Paw - 215 Gilb - Rep - 227.

If the agreement respects an
interest in lands - or stipulates some act in specie

Equity will regularly decree a specific execution — because damages are an inadequate remedy. 1 Bro 526 — 1 Fonb — 27. 139. 2 Ven — 219. 1 Fonb 359. 10 Co — 282

If an agreement concerns the personalty on one side & the realty on the other Equity will decree on bill filed by either party. Ex — A agrees to sell lands B to pay for it — A may have a decree for the money — for there ought to be mutual remedies & he recovers the whole purchase money. 2 Ven — 219 — 10 Wetmore 389.

A general covenant to convey lands of a certain value not specifying them creates no specific lien — therefore not decreed 1 Fonb — 359. 18 W. 450 —

Generally he who demands specific execution ought to shew that he has performed or is ready to perform his part — if he will not or thro his own neglect cannot perform he is not entitled to a decree — 1 Fonb — 383 — 16 Ch. Ca — 302 — 1 Ves. 87. 2 Ven — 19. Finch — 445 Sch 112 —

General rule — When a P has performed in part on his side & is prevented by subsequent events from performing the rest he shall not have a decree for the agreement must be denied on both sides & entirely or not at all — Ex. A agrees to pay £ 1000 to B within two years & marry his daughter & settling a jointure &c — Marriage held but wife died within two years & no jointure settled — B cannot have a decree for the £1000 Gilb. Eq. R. 188 — 1 Ch. Ca 302 Finch 445. 2 Freem. 35. Shem — 287

The Chancy will decree a specific performance of an agreement Eq. to convey, yet it seems to be now settled that it will not decree damages for the breach of such agreement & a bill for that purpose will be dismissed

8 L. Ch. C. 432 overruling Greenaway v Adams 12 Ves 395

Exceptions - Where Pff after performance of part & no default in him is not in status quo - Here he may have a decree - Ex - Where Pff on an agreement between freighter & owner it is stipulated that freight shall be paid only on the homeward bound voyage - & the freighters have no goods abroad - Pff having performed in part shall have freight decreed - 2 Pow - 26 - 1 Eq Ca 70 - 1 Forb - 385 - 4 Ver - 210 - Gilb - E - 70 - Pr Ch 512 -

But if the Pff has been willing to perform & was prevented by Deft - his readiness to perform is in Equity equivalent to actual performance - so also in Law - Dal 112 - Cro - 88 - 2 W.L. 1312 - 4 R - 791 -

Equity will not decree even a written agreement which has been discharged by parol - relatting an Equity - So where an agreement has been invited or forbearing years no decree unless that decree is applicable by special circumstances - As if agreement was upon marriage to purchase & settle lands within three years & commander had been in trade & needed his money or by reason of other circumstances would not spare it - This is not a bar but affords evidence of a verbal release - 1 Forb - 384 - 1 Ver 240 - 6 Br Ch - 580 - 2 Atk 68. 221 3 P.W. 110 1 Br. Ch. 201 - 328 - 2 Ver 299 - Forb - 79 - 240 - 2 Ver 276 - 484 2 Pow - 6 260 - 1 Forb - 321 - 2 Atk 610 - 5 Vin - 534 - 2 P.C. - 82 - 9 Mod 2 -

But no length of time will prevent Equity from relieving against fraud - 1 Forb - 322 - 1 Vin 186 -

But an omission by the Pff to perform his part precisely at the time fixed is no objection to his having a decree 1 Ford-384- 1 Atk-12- 4 Br Ch-329. - Vin- 1 East 22. This it is said is lately altered -

If the Pff has trifled or shown a backwardness on his part in performing - no decree in his favor especially if circumstances are altered. 2 Pow- 260- 1 Br Ch- 22. 5 Vin- 538 -

Difference between marriage agreements & others - In the former the children may compel performance if one part tho the other has failed 2 Pow. C 26- Finch 445

The same principle in favor of a wife under marriage extends to what she was not a party - She has performed her part by marrying 2 Pow-28- 1 Ves 377-

If after an agreement made a Stat. intervenes rendering complete performance impossible - part performance will be deemed & decreed by the party claiming. Ex. gr - agreement to make a lease for 40 years & Stat. prohibits longer lease than for 10 years - Lease for 10 decreed - 1 Ford- 209-11 - 2 Pow C 31 - 3 Bro Ch. 339

So if complete performance is prevented by circumstances or the act of God - Lamb - 2 Pow - 83 - T. 448 Pound - 284 1 Eq. Ca 18 - 3 Br Ch 339 -

Doctrine of Cy-pres obtains in many cases in law
Co L 352 - 219. 2 Bl R. 31 - 2 Ch - 254 - 2 Ch Ca 181 - 163.

This
doctrine seems at first to contradict the rule of law
in Cat 198 - that where a stat - renders the performance
of a covenant unlawful the covenant is repealed
- But the stat - makes the covenant void only so far
as a performance would be unlawful.

So where
one has a power to lease for 10 years & lease for 20
the lease will be good in Equity for 10 years, Amb 740
1 Ford 212 - not so at law Lamb - Amb. 747 - 8
2 Ch 252 -

Rule of law that when one conveys by grant or devise
by devise to "A for life remainder to the heirs of his body or
issue" — A takes an estate tail 1 Co 99 - 2 Pow 41 - 1 Ford
399. 2 Lo R 873 - 10 Ch - 57. 5 Ch - 299. 820 - 7 - 82 - 294 Pr 516
9 and D - 355 - Deane 25 -

Yet on articles to settle land on A
(at supra) Equity will decree a settlement on A for life
only remainder in strict settlement upon the first
& other children in tail 2 Pow - 41 - 1 Eq Ca - 292 - 2 Ver
658 - 2 P.W - 349. 3 Br Ch - 32. 1 Ves 238 - 1 Bond 399. Br. P.C.
470 - 1 P.W - 622 - 8 Coth 293 -

Decree the same tho the
settlement is made (after marriage) giving A an
estate tail - Decree will go according to the articles
2 Coth 293 - Doll 176 - 2 P.W - 356. 2 Pow 642 -

but if the settlement was made before marriage but expressed to be in pursuance of the articles - 1 Ves. 123 - 2 Ves. 638 2 Pow 42 - 2 P.W. 349. 3 Br. Ch 327. 1 Ves 255

These rules in favour of issue are said not to extend to female issue. 2 P.W. 550 349. 2 Atk. 371. Contra 2 P.W. 356 - 3 Br. Ch 327 -

But if the settlement be made before marriage giving to an estate tail & not expressed "in pursuance of the articles" the settlement must stand - need agreement presumed Talb. 29 - 2 Pow - 46. 2 P.W. - 356. n -

The issue cannot be relieved against honest purchasers - 2 Pow 46 - 60 - 3 Atk 291 - Less against creditors 2 Pow 47. 58. 60. Br. Ch 425

Thus are considered executory agreements as executed from the time at which they ought to have been executed - That is the time of making the agreement unless another is fixed - Then the vendor is considered as trustee for the vendee & his representatives are equally bound - Therefore money articled or directed to be laid out in land will be considered as land from the time of the contract & go to the heir - tho' never actually laid out - 2 Pow 656 - 1 Bon 6 - 354 - 413 - 2 Ves - 639 - 16 P.W 710 = Rob. Ex. Cas. 265 = 1 P.W 532, 483 - 3 P. 211 - 2 P. 177 - Br. Ch 543 2 Atk 307. Sel 1254 1 Ves 175 - 96 - 2 Ves 526 -

If application is made to Chancery to secure an interest by way of trust on a covt. or a assignment upon a valuable or meritorious consideration. must be shewn - for the Court will not constitute a equitable trust ~~trustee~~ where is a more volunteer of the claim resting on covt. or a covt. to transfer stock - But if an actual transfer be made the equitable interest will be enforced - for the transfer constitutes the relation between trustee & cestuy que trust the voluntary of without consid.n — 3 P.W. 222 6 Ves 663 1 Folens Ch 337 —

Chancery will compel the production of such deeds only as sustain the title of the party exclusively or jointly with that of his adversary. It will not compel for the purpose of a suit the production case laid before Counsel in the progress of a cause and prepared in contemplation of such suit 8 Co. Eq. Ca. 360 - doubting 2 Bro P.C. 514 Radcliff v Fermand & Ryo. 2 Ver. 175 Preston v Carr. sic also 4 Rep. 190. 192.

money thus entitled shall be laid out in land which shall be settled on the husband for life or he shall have the interest of the money for life — then it is not subject to dower. 1 Ford 414 — 2 Ver 36 — 583 —

It will pass by a devise of land or real estate — tho as a general rule it will not pass by a general bequest to legatees 1 Ch. R. 320 — 2 Pars 109. 2 Ver 639. 1 Bro 172 — 3 Atth 254 = 3 P.W. 221 — 2 Pars 6 — 112 — part —

There rules hold whether the money consists of a particular fund in the hands of trustees or of the owner or mixed with his general funds 2 Pars 86 —

But Equity will not consider money as land unless the agreement to lay it out in fee simple Ex — as to remain in the hands of a — till a purchase can be made &c — not express enough — — So if money is agreed to be invested in lands or securities &c at the election of a party — the election must be made — Lewis it remains money — 1 Ford — 1114 2 Ver — 22 — 3 Atth — 255 — 2 Pars 6 84 = 1 Ver 298 —

So lands entitled to be sold treated as money & conversa according to the foregoing rules — 2 Ver 639. Sel 154 — 1 Ford — 414 2 Pars 6 83 —

Upon this general principle in Equity of considering as done what ought to have been done & that the property is transferred from the time of the agreement made — it is holden that the vendee under the contract

2c- shall be liable (the vendor being in no default) to all contingencies happening to the property between the agreement & the time fixed for the conveyance - Ex- Case of an earthquake in Jamaica - This case is said to be misreported - but the doctrine seems to be established - 2 Pow - 64 - 2 Pw - 411 - 1 Ch 61 - 1 Br Ch - 156 - - Fed rud - Pow D - 660 - 18 Ves 487. (2 B&B 217 contra Semb - cing - this was a case of moonshine the thing entitled to lease was originally a bubble - 1 B&B 161

Con'ct - in which covenantee would not have a lease. but the payment in the case put was to be on a conveyance - & accident had prevented a conveyance -

Agreement to purchase a leasehold tenement & to take a conveyance at a day fixed - where the day one life dropped - loss borne by the purchaser - 2 Pow - 65 1 B.W - 61 -

But if the contract is not for a sale but for a future agreement for that purpose the property is not changed in Equity - It is little more than agreeing that one shall have the privilege of pre-emption - 2 Pow. 29

The money entitled (et supra) is mere facie considered as land yet one who is tenant in fee simple of it may at his election treat it as money & have it retained as such - here there can be no third person whose interests under the articles - & of course it can be of

A Court of Chancery has power to aid a judg. of a cr. creditor to discover & reach the property of his debtor in whomsoever hands it can be found out of the reach of an ex. at Law 20 Johns 554

And it makes no difference whether such property consists in choses in action money or stock the Court can compel the debtor or his trustee to pay it over to the creditor 5 Johns Ch 280 20 Johns R 562 Contra 1. Mont. 384 9 Ves 189 10 do 368.

And service of the bill on trustee will be sufficient notice to him 20 Johns 562

If a judgt. be confessed by mistake the court will interfere whether such judgt. is within its power or not within its power relief may be had in Chancy 1 Wheat 440 Ohio Hickens 3 P.W. 342

Rule. If it appear against conscience to execute a judgt. or of which the injured party could not have availed himself in a court of law or of which he might have availed himself at law but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents a court of Chancery will interfere 7 Cranch 332 2 Pet. C.R. 516

1 Sumn. C.C. 282
1 Nor. 84
1 S.L.J.Sy. 13

no inquiry to attend. 2 Pow. 112 - 1 Ford. 113 - Rob. F.L. 667 no
2 Ver 295 -

But to make it considered as money he must
show his election that it should be so considered
Eq - declaring in his will that it should go to his
Ex^rs - or describing it as so much money to be laid
out in land - here it will pass without the solem-
nities of a devise - & parol proof of facts or even
declarations of the testator (tenant in fee) is admitted
to show his election or intent - as the fact of his
having received part of the money & appropriated it to
other uses - 2 P.W. 145 - 3 Ver 221 n - 2 Atk 206 - 1 Br. Ch. 228 -
238 - 2 Pow. 244 - 17. 1 P.W. 488 - 2 Pow. 117 - that he considers
as money - rebutting an Equity

Want of mutuality in an
agreement is a decisive objection to a decree for specific
execution - so unintelligible Eq - A agrees to sell to B a
manor for £12000 less than any other purchaser would give
& B is not bound to take it - unintelligible & not mutual
2 Pow - 282 - 2 Ver - 415 - 1 Eq Ca - 20

But if originally
mutual - no subsequent want of mutuality is an objection
to a decree - Eq - Agreement to sell stock for 120 percent
which afterwards fell to par - 2 Pow - 282 - 2 Br Ch 415 -
1 Atk - 10 - 1 Br Ch 156 -

Penalties waived by Pl^ff in Equity -
Seem the bill is demurrable - for if Deft - was obliged
to answer without waiving Pl^ff would resort to C. L

2 Pau - 404 - 18 Ves 60 -

Generally Chancery will not suffer advantage to be taken of penalty or forfeiture when the substance of the contract may be obtained without it - is relieved against it - Ex - Interest on a mortgage with clause of increase &c - 2 Ves 316 - 289 - 4 Burr - 2228 - 2 Atto - 520 - 231 - 241 -

Where therefore compensation can be made according to a clear rule of damages - here the substance of the agreement can be obtained - 2 Pau - 205 -

But where there is no rule of damages Chancery cannot relieve against the penalty &c - Ex - Lease covenants not to alien without licence of lessor under penalty of forfeiting the lease - here as the substance &c - cannot be obtained without it there being no rule of damages - penalty not relievable against - 2 Pau - 205 - 9 Atto - 112 -

So tho' there is a rule of damages yet if by reason of intervening events no compensation can be made as a substitute for the penalty - Ex - A in his marriage articles ~~that if~~ covenants that if he does not settle such a jointure within two years he should lose all his wife's portion except the interest - wife died before jointure settled within the terms - Forfeiture must arise tho' the agreement of the jointure is known - for the wife being dead no compensation can be made -

Where the only ground of equitable jurisdiction is the discovery of facts solely in the knowledge of deft & the deft by his answer discloses no such facts & the pltff supports his claim by evidence in his own favr unaided by the confession of the deft the bill should be dismissed

7 Grants 69. Russell v Clark &c.

If trustee mixes trust money with his own employs them in an adventure of his own or if he then employs them separately contingent trust may at his election have a proportionate share of the profits or an interest on the sum thus employed 8 La Ch. 6 172

J

1286

2 Pow-205- 1 Ver-68 - 1 Fonb - 387-

Whenever one party to an agreement stipulates voluntarily an advantage or favor to the other on certain conditions the latter must lose the advantage he unless he strictly comply with the condition the penal in effect - Ex-Ce condition offers to take less than his debt ~~unless~~ if paid by a certain time - Payment must be made precisely at the time or the debtor must pay the whole - 2 Pow 215- 1 Ver 220- 2 Ca and 481 3. Ch 160- 1 Ver 456

General rule that whenever Equity will relieve against a penalty in an agreement it will enforce the agreement & vice versa - 1 Fonb. 141

Formerly holden that where there was a penalty in an agreement the party bound had his election in all cases to do the thing or pay the penalty - 2 Pow 126- 1 Fonb - 141-

Present Rule

When the penalty of a bond &c - appears to be merely a security for the performance of something collateral so that the enjoyment of the collateral object appears to have been the thing intended to be secured Chancery will relieve against the penalty & enforce performance - but - if there is no rule of damage or no compensation ente - Dany 431- 1 Fonb - 141- 1 Br Ch 418- 3 Ba 691- 1 Pow - 171-

This is generally done by injunction on payment of principle interest & as the case may

be costs – But in these cases Equity will decree performance of the collateral thing for the obligor in this case has not his election to do one thing or the other – 2 Pow 136 Strat 533 – 2 P.Wms 191 10 Mod 517 – 2 Ves 528 – 2 Atk 371 – Burn 2228

When the sum to be paid on non-performance is in nature of agreed damages Chancery will not relieve against it tho' the rule of damages – Here the penalty is not intended as a mere security for another thing (ut supra) but as a compensation for the loss of it – 1 Ford. 112 Burn 2228 – 6 Br. Ch. 417. 71 –

So in this case Chancery will not decree performance of the covenant nor generally restrain its violation for the obligor has his election to do so – or to pay the damages agreed – Eg. lease covenants "to pay £5 for every acre of mead ploughed" Seem if covenant "not to plough" under a penalty. 1 Ford. 112 2 Ves – 119 – 2 Vez – 32 – 3 Ba 133 – Burn 2228 – (vide 1 Ath – 31 – 22. 32 –

But where the penalty is a mere security or a collateral thing & not a compensation for it the obligor has no election – Chancery will decree performance – Whether the sum to be paid is strictly a penalty or a compensation depends upon the construction of the whole instrument – Noy 88 9. Co 3 L 4 & 5 – Some courts of law are reluctant to chance penalties – 1 Ba 344 – 8 – 691 – 1 Wil 320 – &c –

it seems that where there are several parties to a bill & several matters are charged with some of which one party has no concern he may demur for multifariousness 10 E. 6. 6 157 –

If a debtor convey to trustees in trust for the benefit of creditors to whom no communication of the conveyance is made & who are in no manner privy to it it operates as a mere power revocable by the debtor. 8 Cond. Ch. C. 95 doubting 5 Sawy. 7. where the same doctrine was holden the both debtor & trustees had communicated to the creditors the notice of the trust deed the creditors not having assented & decided it id. 8 do 106.

But grantor cannot recall a voluntary deed which he has given for the benefit of his children 86 Ch. C. 102.

So in Ct. St. Ct 27. Cowp. 357. Lemes 25-6 2 Ch/357

2 Eng.

if an agreement on which &c. is denied in Chancery & proved by one witness only an issue in law is directed & the case retained on the equity reserved. Chancery will in this case retain the bill tho on a personal contract — the relief not being demanded to. Paw 354 — 7 R 667. 767 Esp 709 Bull 285 — 2 Paw. 216 —

When Chancery relieves against penalties of bonds for performance of covenants &c it frequently ascertains the damages by directing an issue — quant. damnificatur est — & awards according to the verdict — 2 Paw — 241 — Vin. 442

Setting aside agreements

Chancery will sometimes refuse to decree specific execution of an agreement against which it would not grant relief — Ex. — an agreement unreasonable tho not attended with fraud — for mere unreasonableness is not sufficient ground to set aside a contract — Discretionary in some measure to decree or not Show. P. Ca 20 — 2 Paw 228 — 152-8-200 — 5 Vin — 549 — 2 Eq. Ca. 58 2 Paw — 177. 220 —

But fraud in the transaction is a good ground for setting aside an agreement — & unreasonableness may be one circumstance among others to evidence fraud — 2 Paw — 145 — 2 P W — 203 — 3d — 290. Vinty — 356

1273.

Setting aside agreements

206-A.C.-526.32 — 2 Atk 324 - 2 Ves 627. 4 Br CC 556

An agreement obtained by undue hardship & oppression (a head of equity distinct from fraud &c) devest) set aside in Chancery - Ex - An agreement in a mortgage that if interest be not paid at the day it shall become principal - But such agreements after wards ratified "freely with his eyes open" are not set aside - Fall. 41 - 2 Sal. 449 = 2 Pan C 163 - 2 Ves 152 - 16 Ves. 27 Id 294 - Lo of those obtained thro fear &c 2 Pan 163 -

Where the oppressive agreement is unlawful Chancery will a fortiori relieve against it - Ex. to pay money - here the debtor is not considered as a particeps criminis - 2 Pan - 148 - Fabb - 38 -

But where the parties are equally guilty Chancery is neuter - "volunti non fit injuria" - Ex - one loses at gambling & pays the money - Equity here will not relieve beyond the ex pop provisions of positive law - "In pari delicto" Comp. 200 2 Pan - 150 - Fabb - 41 - 1 East - 98

Any unfairness in the Pff will prevent a decree in his favour - "clean hands" - Ex misrepresentation as to the value of the subject matter 2 Pan C - 221 - 6. 3 Atk 883 - 1 Ves. 227. 9.

So suppressing the truth to the disadvantage of the Dft - no decree for Pff - Ex - Bill to compel

Setting aside agreements.

Set to complete the purchase of an estate represented as yielding a rent of £90 - & no notice given of an annual assess - 2 Pau 222 - 1 Br Ch 440 3rd Ch 539 - 5 Ves 353 Rol - Ch. C, 524 - 8 - 20

Yes in some cases where there is a misrepresentation without any deceit or unfairness - As when an agent for sale of an estate sold at an under value from a mistake as to the quantity of interest & in some other circumstances 2 Ocan, 125 - 196 case of Elwood & marler 2 Br Ch 326

Rule - that if the fact misrepresented is the cause of the agreement it is set aside - Secus if the mistake is not a sine qua non to the agreement - 2 Pau 196 - 1 Ves 400 Morely 364

Gen. Rule - that voluntary agreements or covenants under seal are not aided in Chancery for here only nominal damages are recovered at law even in case of a covenant - 1 Pau 341 - 2d 242 - 1 Cotth 90 - 1 Ves - 738 - (Ex cetera cuncta)

But the compromise of a doubtful right is a sufficient consideration - this is different from the case of a mistake which is a sine qua non of the agreement - When the parties are apprised of the doubt & make a contract of hazard intentionally 1 Cotth 10 1 Ch 26 2 Pau & 200 - Ib 142 = 2 Cotth 587 - 92 -

Parol with all respectify lands done in Chancery if partly executed 1 Pau 428 - 5 Ves 522 - 2 Ed Ca 116 -

Setting aside agreements

So in case of private trusts provable from circumstantial facts - Ca. W. 65, 119 2 Ca. 6-257 - 2 Ves 288 - Tab. 60 Br. Ch. 529 - 2 Atk 71 = Sand fd. vs Warburton Ch. C. 99 - cor -

Agreements obtained by coercion not amounting to duress not deemed but set aside - So from undue influence - Ex - That the intended husband should release to the wife's guardian all arrears of the mesne profits of the wife's estate - Not so in case of fear arising from a just resentment or respect if the agreement be reasonable 1 P W 118, 2 Ca. 160-89, 264 = 18 Ves 19. 1 Atk 11 - 1 P W. 639. 1 Br Ch 389.

Intoxication is not a sufficient ground for vacating an agreement in Chancery unless effected by the other party or unless some unfair advantage is taken - So weakness of mind if the party be legally competent is not of itself sufficient alone for setting aside an agreement - Sellers if attended with fraud or any suspicious circumstances - 1 Ca. Ch. 29. 30 - 3 P W 130. n. 129. 18 Ves 19

Contracts are sometimes enforced in Chancery against infants tho' not valid at law - It acts as guardian - Ex money borrowed by an infant & actually expended in necessaries - So in other cases where the contract is clearly for the benefit of the infant - 2 Ca. 258 - 1 P W 558 5 Mod 368. Sal 387. 1 Ch. 6-68

Agreements operating as a fraud upon third persons are never deemed but set aside - neither

C. B. & C. by fraudult. practices obtained a note of J. made payable to C. or bearer upon Claim, will release ag.st this note. 1 Aug 107.

are they now good at law - they cannot be ratified by the parties being void - 2 Bam 165 - 6 Eq Ca 88 Fol 156 1 Ver 348 - 412, 4 - 2 Ch. F.R. 538. 2 Ves 375 - 1 Bam - 185 - = 4 Br 166 1 Ph 481 - 332 - 696 - 2 Ph 763 - 1 Bos - 95 - 286 - 1 Ver 602 1 P.C. - 496 - 3 - 75

In marriage brocage bonds - Bum - 4 4 - 7 Feb - 245 - 1 Bam - 174 - 97 -

Contracts agreement to return part of the portion to the parties on one side - where contracts are unlawful 1 Bam 174

Contracts with heir apparent for their expectancies always varied in Chancery - formerly not set aside unless the terms were disadvantageous to the heir - the rule holds whether the heir is an infant or not 2 Bam & 181 2 Ver 14-27 1 Ver 123 1 Ver 85-167 1 P.C. 210 - 3 - 292 2 Ves 125 -

Set aside the afterwards executed in same case tho executed in obedience to a former decree in favour of the agreement 2 Bam 183 - 3 P.C. 292 n 2 Ver - 14 -

Rule - If the original contract is shown to have been fair and is ratified freely on full information - good - otherwise satisfaction not good 2 Bam 184 - 2 Ves 159. 1 Wes - 320 - 1 P.W. 320 - qu, are their contracts void at law?

Evidence of the title deeds in Chancery to be delivered up - 9 Mod 297. 2 Atk 307 - 1 Ver 479.

Agreements to do a thing which would lead to

Injunctions

Suspicion extortion or immorality not allowed. 2 Ban 259. 2 Ves 238 1 Ban 183.

Let off allowed in Chancery — so also allowed in law under 2. 88 - Cod 2 - Ut supra - 2 Bl 204 - 4 Br 123 - Ed 456 - 2 Wil 440 - P 65. Cowp 56 -

By our Stat 130 - original petitions in Equity are to be brot before the Gen. Assembly where the thing demanded exceeds $335 — the S. C. if it exceeds $335 — or if it is for relief against any judgt or cause depending before S. C.

No appeal from decrees in Chancery — but in Ct writs of error lie as from judgt at law — Where the subject matter is uncertain in value - the alleged value determines the jurisdiction - 2 Root 112 -

Injunctions are prohibitory writs restraining a person from doing a thing which appears to be against equity & conscience. 3 Bac 172 -

Injunctions are in personam - The most usual injunctions are to stay proceedings at law on the ground of equitable circumstances to which courts of law do not advert 3 Bac - 173 -

If declaration of filed in Eqy - ejectm only is stayed - if not all proceedings are stayed till answer or further order 3 Bac 173 - 2 Ban 146-46 1 Ver 25 - 329

A miner at gaming brings a suit at law for recovery of the money won (it having been in the winner's possession & forcibly taken from him by the loser) Chancery will issue an injunction 1 Ver 489. 2 Vi. 3 Ba 172

But it cannot issue injunction to stay proceedings in a criminal case in B.R. & if it should B.R. would protect any one who should proceed in contempt of it 3 Ba 178 - Cullad 16 -

Injunctions to stay waste or for cutting trees &c in favor of a remainder man or reversioner against tenant for life or years 1 Br Ch. 57. 2 Ca 150 - 2 Vi 438 - 4 Ba 173 - 1 Ford 29. 8 Ph 220. Mit 124 - Hard 95 - 1 Eq Ca 221 -

Injunction to stay waste will issue in all cases where the action of waste would lie at law and in many others - Ex. action of waste lies only in favor of the immediate remainder man or reversioner having the inheritance - Injunction issues in favor of distant remainder man 3 B 227 - 1 Vern 23. 3 Atk 94 - 723 - 7 Cam 450

So it goes to mortgagee in fee - in fee simple for cutting timber if he does not apply the avails in sinking his debt 3 Atk 723 - 2 Cox 51 - So against mortgagor in possession 3 Atk 723 - P. W 175 -

If tenant for life without impeachment for waste fell down timber

Injunctions

buildings injunction issues (tho not for cutting timber) 1 Vern 23 - 2 Ab 728 Ambl 107 - 2 Com 512 Salk 161 - 2 Raw 87 - 2 Br Ch 89 -

So in the case of a tenant directed to repair the buildings injured 2 Vern 738 - Pr Ch 454 - 1 Eq Ca a 400

So injunction will issue vs such a tenant in some other cases - 3 Ab 215 - 1 Ves 244 - as to restraining cutting trees intended for ornament &c 2 Com 51

It sometimes issues against one claiming the inheritance as trustee 2 Com 51 -

Action of waste lies not against tenant in tail after possibility &c but injunction will go against him if the waste is very unreasonable 1 Eq Ca ab 221 - 1 Com 50

So injunction issues to restrain nuisances Eg - to stop a building obstructing ancient light 2 Com 51 2 Ves 452 - 18 Ves 543 -

But the right must be founded on prescription or if they are not an agreement 2 Ves 452 - 1 Saub 29 - 2 P W 266 -

It goes to stop a building on another ground 3 Ba 174 - 1 Saub 29 -

But the nuisance must be such with the Ch terms a nuisance therefore it goes not against the building a house for inoculation for small pox &c 2 Rol 129 140 - 3 Atk 750 -

8 L. Ch. 300
2 Sumn. 313

Where Chancy has obtained jurisdiction of the person it may compel the party to give a valid conveyance of lands in another State & to desist from the prosecution of suits in any country 2 Paige 404 5 Mad. 297 but if the suit is already commenced it will not interfere 4 Cran. 179 & ch 278.

If one party & see another expend his time & money upon any work without giving him notice or attempting to prevent him from proceeding Chancery will not interfere in his behalf by injunction 10 C.E. Gr 340

An injunction to stay waste is never granted where Deft is in poss.n claiming adversely to Pltff. 7 J. C. 6
165 315 " 14 do 21. 6 Ves 51 –

Said in 3 Paige 214 that the cases in which Chancy has interfered by injunction to prevent a mere trespass are those in which the complainant had been in the previous undisturbed enjoyment of the premises under claim of right or where from the irresponsibility of the defendant or otherwise Pltff could not obtain relief at law

If irreparable injury is present 6 Ves 147 7 do 308 10 do 290 17 do 128 18 do 184 digging ditch to prevent the removal & destruction of Pltffs freehold – do to prevent diversion of water from a mill it being an entire destruction of the mill 1 Bro C C 543 15 Ves 138 but in all these cases there was no dispute as to pltffs title 4 Hand 578

Injunctions

It does not issue to restrain common trespasses but if so long continued as to become a nuisance it does issue 2 Com 51- 3 Atk- 21-

It does in certain cases in bringing for a penalty at law 3 Bac 691- - In C. cts of law chancery - so now in Eng^d by Stat supra

Injunctions sometimes issue to stay trials at law- as where it appears that Pl^ff Equity must arise out of Def^ts answer — 3 Ba 174- 2 Char ca 44. 76. 93.

So injunctions are granted to establish the preventing parties title when harrassed by diff^t suits of ejectments 2 Char 241 contra reversed in House of Lords Br P. C. 244-

This is a perpetual injunction - Brange 404- 10 W 471- so prevent infringing 3 B 438-9- 1 Vern 308-

So in some other cases injunctions issue to quiet a person in the possession of his estate as where he has a plain indefeasible title and has been in poss^n several years &c- 1 Vern 176-

Baron says that it now very often granted 4 Ba 174- 2 Atk 282- Ex- trustee agrees to sell to A and cestuy que trust does sell to B- then trustee disturbs B's poss^n which he had several years

Injunctions issue also in other cases than those of ejectment & to prevent

Injunctions

multiplicity of suits - as where many suits are depending or likely to happen from the same thing - Ex - Several tenants of a manor claim the profits of a manor fair - So to settle boundary of land &c - Milf 4 - 401 - 127 - 8 - 313 n 174 - 1 Vern 22 - 308 - 244 - Mr Ch 241 1 Atk 282 - 2 Atk 484 - 3 Br 434 - 9 - Shum Dr Ch - 17 -

So under a title between persons claiming to be Ex - 240 - injunction issues to restrain either from acting as such 2 Ba 400 Sid 177 - 1 Ke 683 - F. Ray 93 -

As Chancery will relieve vs fraud - so will it issue injunction on suggestion of fraud to stay proceedings at law fraudulently 2 Com 48 - 1 Vern 489 -

Injunctions in favor of authors restraining others from publishing their works were frequently before the Stat Anno - Ann 06 164 - 1 Fonb 30 - Mich 174 - 1 Vern 120 - 275 - 127 - 4 Burr 2303 - 2400 2409 - 2417 -

Division in Dane Anor. 1 That at C.L. an author had the first right of printing and might maintain action &c by eight judges and Ld Mansfield vs 3 - 2d That printing did not take away his right p. to 4 Ld Ma. with the 4 - 3d That the C.L. action is taken away by Stat Ann 1705 - but Ld M. near with the 5 - Has for Equity will relieve vs a judt at law See Com Dig Ch 7. 5 W 3 Atk 223 -

The respondents answer to a bill in Chancy praying for a disclosure is inclusive 1 Day 186 Cranch &c &c.

A sold to B. a piece of land & received his notes for the purchase money & gave a deed - B. Died - Chancery decreed a sale of the land to pay the notes - Became a vendors lien or a lien on the estate sold for the purchase money 1 Ves 483 759 760 1 Atk 1 Eq 132 1 Bro 420 Sugden Ch. 12. P 352 while in the hands of Grantee when there is no contract by which it may be implied that the lien was not intended -

Prima facie the purchase money is a lien & lies upon the vendee to show the contrary 1 Johns Ch 309

Taking a promissory note ~~etc~~ for the purchase money does not affect the lien & if a part be paid the lien is good for the residue the vendee being a trustee for what is unpaid 1 Johns Ch 309 1 Bro 420.

Equity will not interfere in matters of Partition on the ground of inequality where the regularity of the proceedings are not impeached 8. C. E. Ch. R. 376 Suppose such inequality raises a presumption of fraud on the part of distributees & yet discovered by Vs. 143. 11 do 157 n 17 do 546 n – But a party has no genl. privilege or protection he is bound to disclose all he knows relating to the suit respecting his own case & the case he has held before counsel for their opinion uncommunicated with the suit itself but his Counsel cannot be compelled to make such disclosure 8 C. Ch. R 394. whether the facts were confided to him in contemplation of a suit or not if imparted to him in the character of counsel – this case reviews all previous cases –

If a claim is to be satisfied out of a fund amenable only by the aid of Chancery application may be made in the first instance to that Court which will not require the claim to be first established in a court of law
Russell v Clarke Exr. 7 Cranch 69 —

It is an established rule in Eq. that relief in consistent with the specific relief prayed cannot be given under the gen. prayer. 14 Johns. 561 Beekman v Frost per Spencer

In Genl. Courts of law will not lend their aid in enforcing injunctions nor ordinarily take any notice of such writs in the course of their proceedings
4 Hill 266 1 Sch 322 6 Mod 288 2 Burr 660
1 Bro & Bing 219 3 Mein 234

The writ will not be granted where there is a remedy by
action Doug 524 13 R 396 10 Johns 181 1 Maule & S 32. 8
East 213 13 do 419 or by writ of error 2 Johns Cas. Norman 144
72 or by information in nature of quo warranto
2 Johns. R. 79 1 Maule & S 101 – the remedy by indictment
will not prevent the granting of this writ 2 Maule & S
10 Wend 393 3 Burr 1267. 4 Bac. Mandy 6 Hill 243

Mandamus

It lies is a prerogative writ issuing from the Court of Kings Bench in Eng & answers in some degree to the specific relief afforded by Chancery. Ser. 175 3 Ba 540 - 331. 150 Salk. 429.

It is not sued to recover damages but to restore the party injured to his right -

It lies in currently it to relate to Government or the public without which there would be a failure of justice 3 Ba 522 1 Atto 281. Burr. 1267. L.

The object of it is to restore or admit a person to some franchise or right which concerns the public & of which he is deprived 11 Co 93 - L.

It never issues against an individual but against a public officer - body corporate or some inferior court commanding a performance of their corporate or official duty 3 Bu 528 1, Atto 52 - Bent 217.

The town & parish corporation in Et - may be subjected to this writ -

It is demandable of common right by the individual when he has a right to it & the court have not the power to impose terms as Chancery has 5 Ba 528

This writ lies to compel the proper officers of a ~~court~~ corporation to call a meeting of the corporation where they are compellable by law to do it & refuse Stra. 1003 7 Mod 431 - 1 Sid 14 -

It also lies to admit or restore a person to the enjoyment of a corporate office when he has been duly elected. 1 Vent - 77. 4 Burr - 1999 - Popk. 176

Mandamus

It will issue to compel persons in authority to do their duty – As if Justices of the peace in Ch. should refuse to render judgt. the Supr. Court on application by the party injured will issue a mandamus – Burrh. 457. Stra. 113 – 552 – Sal. 299. 3 Pa. 530 –

It will issue against a clerk of a corporation commanding him to deliver over the books & papers of his office to his successor – 2 Stra. 889. Esp. 663 –

As to what offices within the public administration of justice no precise rule is laid down in the books – We suppose they are such as are offices of the law. 11 Co. 94 2 Salk. 122 – 1 Vent. 243-53 – 2 Keny. 211 2 Sid. 112 Sal. 185 –

It will issue against an inferior court a person having legal right to practice as an attorney commanding them to admit him to practice 1 Vent. 11. 1 Keb. 459. 1 Lev. 15 –

The office must be of a certain permanent nature – therefore an office which is appointed under an institution by voluntary subscriptions & not incorporated or endowed by law is not an office subject to this writ – as the clerk of a circulating library – 1 Wils. 11 – 1 Burr. 531 Ib. 125 –

By the permanency of the office is not meant that it should be a freehold nature but that the office is one appointed by law 1 Lev. 551 –

2d St. – the Supr. court will issue this writ to command a county treasurer to pay money to one who is entitled to it if the treasurer refuses so to do – So also against the justices of the peace in the county commanding them to lay

a tax for the purpose of building a jail where it is their duty & they refuse – So against the selectmen of the town commanding them to support the poor of that town.

When the office is of a private nature the writ can never be issued to compel a performance of official duty – Lev in Eq – It will not lie against the steward of a court baron – Esp – 666 – Fo 40 – 1 Vent 143 –

This writ will never issue to compel the performance of an act by a magistrate or officer when it is doubtful whether he has a right to do the act / 1 Wils 266 – Esp 665 / Neither will it be issued when there is any other ~~relief~~ specific legal remedy by which the person complaining may obtain redress – As when an application was made for a mandamus to compel a bank to transfer stock the court refused it because the party had a remedy by action on the case if they refused – Lenb – It will not issue where the party has a remedy in Chancery Doug 506 Esp. 665 –

It can never issue against a court inferior to compel them to perform an act when the performance of it is directionary – Stra 881 2 Wil 308 –

If several are deprived of a franchise or office they must have separate writs as the causes of their deprivation may be different Lech 443 – Burr. 266

Mode of granting this writ

It is sometimes granted on the first motion that is usually – the usual mode is for the

Mandamus

court to make a rule on either the party complained of to appear in court & show reasons why a writ of mandamus should not issue – The first motion of the party applying must be supported by affidavit 3 Bl 111. Eq. Cly. 32a 528 – Burr 199 –

Under special circumstances it may be issued in the first instance on the first motion – as where an immediate interposition is necessary – for where a motion was made for a mandamus against the Justices to compel them to support the poor the court issued it in the first instance lest the poor might starve if a rule was granted to show cause – here the court was satisfied by the proofs. Eq. 669 Sayer 160 –

But the court will never tell there has been an actual assault in him against whom it issues as it is not a proper remedy Eq. 670 – Burr 199.

The writ must be directed to the person whose duty it is to perform the act of which complaint is made for it cannot be directed to one person to command another to do the act Lev. 433. 6. Eq. 672 –

Where the act ought to be performed in some part of an aggregate or written the writ must be directed either against the whole corporation or against that particular part Eq. 675 Sal. 609. 761. Stra – 55

When sufficient cause on the return of the first writ is not shewn the writ itself issues – the writ in the first instance is not usually peremptory but requiring the act to be done or shew some reason why he ought not to do it – 3 Bl 111 –

If the writ is defective deft may move to quash it 7 East 345 4 Cowen 73 - if not quashed he must make return to it or do the thing required - if he makes return he must deny the facts or set up suff.t matter in avoidance Batty, R 628 10 Mend 31

any defects in substance in an alternative mandamus may be taken advantage of at any time before a peremptory one issues Holt R 438 5 Burr 2740 3 Burrow Rtd 1221 10 Mend 31 -

Relator must show his title clearly & distinctly as in other declaration Cowp 310 7 East 345 5 Burr 2742 10 Mend 35

Mandamus

If the deft. in the writ returns sufficient cause for not doing the act he is excused altho the reasons are false in fact for at C. L. the return of the person on the writ is not traversable but an action on the case will lie against the party making such false return 1 Vent. 111. Sal. 432 Esp 682.

But now by 9. Geo. the return may be traversed therefore if he makes a return false in fact it may be traversed. 3 Bac 543. ~~Esp~~ Ld. R. 481.

Since this Stat. the jury may try the truth of the return & if found false a peremptory mandamus will immediately issue therefore there are now two remedies for making a false return - the only remedy at C. L being by action on the case.

If a false return is made by several an action will lie against all - any or one of them 11 Co 99. Earth 151 - 3 Bac 544.

If any one of several justices be sued for a false return & that one was opposed to a false return but was overruled by a majority he will be excused 2 Ray 564 Earth 172

Where the return on the rule to shew cause is insufficient on the face of it a peremptory mandamus issues of course. Sal. 204 - Esp 685 - 2 Sal. 111.

If on trial of the action on the case judgt. is rendered in favor of the Deft. that the return is false a peremptory mandamus issues

Mandamus.

of course – But this rule will not hold unless the action on the case & the application for a mandamus are both in the same court 8 Ch 430 3 Ba 544 –

2 If no return is made on the peremptory mandamus an attachment issues – a refusal (Ex 8 – 416) to return is punished as a contempt – 2 Ch 429. 3 Bl 111. 4 Ba 808 4 Bl – 281 –

But an attachment never issues till after a peremptory rule for him to return the writ

3 The attachment must go against all the Defts in the writ of mandamus altho some of them were in favor of making a return – qu. Sup –

4 The supreme court of the U.S. have decided that they would not issue a mandamus being ~~extremely~~ restrained by the constitution which gives them appellate jurisdiction only except in a few particular instances –

I know of but one instance where the writ has been issued in Ct – That was against the town clerk of Litchfield commanding him to record a deed which he had refused to do – 2 on the return of the writ the court adopted the State of Conn – as the rule of proceeding in trying the sufficiency of the return

Rule 345

Mandamus

An action on the case lies against the person making a false return to a mandamus. 3 Bl. 111. Bull. 62. Esp. 648. Cowp.

The office of parish clerk is temporal one & the appointed by the minister & removable by him without suff cause this writ lies Comyn 370.1 and 1 Burr 367 2 Str 942 1108 11 Mod 261

A peremptory Mand. will issue in the first instance to a town clerk who refuses to record a deed 14 Johns 325

Mandamus lies to correct erroneous practice of a Court of Common Pleas except in mere matters of discretion 1 Cowen 15 - and form of mandamus 1 Cowen 22 - 5 Burr 2740 to 2761

Prohibition

This is a prerogative writ issuing generally from the court of Kings Bench to prevent inferior courts from proceeding thro' limits of their jurisdiction 3 Bl. 112 - 4 Ba - 240 - 12 Co - 8 - 4 - Com. 287.

This writ may however issue from any court of Westminster hall 1 Bl 476 Sal - 15 - 8 Salk. 523 - 1 Wil. 476. 12 C 58 -

It is directed to the inferior court & the party prosecuting commanding them to cease from the prosecuting of the suit & is always founded upon a suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction but to the cognizance of some other court. 3 Bl. 112 -

The mode of obtaining it is similar to that of obtaining a mandamus being a rule on the court below to shew cause why the writ should not issue - the motion is supported by ~~affidavit~~ the affidavit of the party applying that the cause is not within the jurisdiction of the inferior court - 4 Bl. 476 Sal. 549. Holt - 593 - Hob - 79. 2 C 128 -

It is a question whether the party is entitled to it as a matter of right or whether it is discretionary with the court to grant or refuse it - the better opinion seems to be that it is discretionary with the court - Hob 87. 2 Keb 3. 4. Sid 65 Sal - 33 - 2 Ra 220 - 578 - 86 -

1290

Prohibition.

The object of the writ it is said is to prevent the inferior court from exceeding their jurisdiction but this is not always the case for where stat. has prescribed a particular mode of proceeding & the court does not follow the mode this writ will issue because they attempt to take cognizance of a cause in a way contrary to the stat. — This then & the want of jurisdiction are the only cases in which the writ will issue. 2 Hal. 100.

If the causes suggested appear to the court to be sufficient the writ of prohibition immediately issues commanding the court not to hold plea & the party not to prosecute. 3 Bl. 114.

But sometimes the sufficiency of the cause suggested is doubtful with the court in such case the party is to declare in prohibition. To declare in prohibition is for the party to prosecute a civil action by filing a declaration against the other upon a supposition or fiction (which is not traversable) that he has proceeded in the suit before notwithstanding the writ of prohibition & if upon the pleadings in this fictitious action the court adjudge the suggestion to be a sufficient ground of prohibition in point of law then judgt with nominal damages shall be given for the party complaining — & the suit prosecuting in the inferior court & the court shall be prohibited from proceeding any further — Cro. E. 736 F. N. B. 44 — 1 Leo. 125 — 4 Mod. 151 — 3 Bl. 114

But if the Supr. court shall

adjudged the suggestion insufficient then judgment will be against them who make the suggestion & a writ of consultation shall be awarded as called because after deliberation & consultation the Judges find the suggestion ill founded & this writ of consultation returns the cause to the original jurisdiction (inferior court) to be there determined 3 Bl 114

Sometimes there is a writ of consultation granted when the writ of prohibition has actually been sued - for if the ground of granting the prohibition be proved in point of law yet if the fact that gave rise to it be afterwards found a writ of consultation will be granted remanding the cause to the inferior court 3 Bl 114

In some cases the court itself on its own mere motion will award a writ of consultation — as if they have issued a writ of prohibition & should upon further consideration be of opinion that it ought not to have gone - they may grant a writ of consultation & stay the prohibition 3 Bl 114 -

Disobedience to the writ of prohibition is a contempt & the court will punish it as such with fine imprisonment or corporally at their discretion. 4 Ba 262 F N B 40. 4 Bl 287.

The commencement of a new suit for the same thing in the same court after a prohibition had issued is also a contempt & as such will be punished. Moor 599. 1 Leon 184

The process by which a contempt is punished is by ~~mandamus~~ attachment

1292

Prohibition

as in case of a mandamus 1 Vent 348. 4 Ba - 262 -

We have a

stat empowering the chief Justice of the supr. Court or any two of the other Justices thereof to issue the writ of prohibition in vacation - If it is term time application must be made ~~in term time~~ to the court themselves - This writ whether issued by the whole court the chief Justice or any two of the other Justices must be sealed with the seal of the court - The second paragraph of the Stat adopts the E.L. or Statute law as the mode of proceeding on the writ - 8 Ct 347. 8

An action for false return to a mandamus is founded in tort & hence may be either joint or several Earle 81 5 R 649 -

The party shall not stop the proceedings of a court of justice by a prohibition upon a mere suggestion without an affidavit - Comp 330 4 Burr 2032. 35 -

Where a matter is properly triable at C.L. this writ lies before sentence but if a party submit to trial it is afterwards too late Comp 424

Where a C. has no original jurisdictn. prohibition lies after sentence but where the C. gives a wrong judgt. it is the subject of appeal 8 T.R 4 2 Burr 813 1 Burr E.L 381

Where a right is derived from an act of Parliament an injunction issues upon filing the bill but in special cases of rights derived from royal prerogative no injunction issues until the answer comes in or the right appears by record to the Court 1 Mil 139 Lacy 150 157 — so to prevent waste working mines fructing locks &c injunctions are granted as a matter of course before an appearance or answer 2 Dick 1142 1145 647 3 Ves 140 2 H Bl 463 vide 8 HR 95 9 Ldns 5 344 ang° — 569

Habeas Corpus

This is a writ by which a person restrained of liberty may be brot before a superior court for a special purpose either at the suit of the person restrained or at the suit of some other person who has a right to have him in court. of this writ there are various kinds 3 Bl 129 Vaugh 126 3 Bac 1.

1. Ad respondendum. which lies where one has a cause of action against another confined by the process of an inferior court & the object of it is to remove him to charge him with this new action in the court above. 3 Bl 129. Dy 197. 249. 3 Bac 2 2 Mod 198

2. Ad satisfaciendum. which lies when judgt has been recovered against one confined in prison & the Pltff wishes to bring him up to some superior court to charge him with process of execution. 3 Bl 129

3. Ad faciendum et recipiendum. This lies where a Deft is confined by the process of an inferior court & wishes to remove the action to a superior court to be there decided 3 Bl 130 3 Bac 2. 1 Mod 235. 2. 198

This is demandable of common right on application of the party & it instantly supersedes all all proceedings in the court below. It differs from the former two in this. that those are at the suit of some third person this at the suit of the person confined. & the this

Habeas Corpus

writ is demandable of common right yet it is said it will not be issued when the effects of it will abate a suit not already commenced – This is not correct for the Supreme court issue the writ too when they are informed of the suit commenced they retrieve it by a writ of procedendo – Sel 802 – 3 Bl – 130 2 Mod 306 3 Bac – 15 – 12 Mod 666 –

Neither of these three kinds of Habeas corpus are known here –

4 – Ad testificandum – This is in use here as well as in Eng – It is prayed out by a suitor in some court who wishes for the testimony of a person confined in gaol – & this writ removes him to the court to testify – As soon as he has testified he is remanded back to his place of confinement – 8 Reb – 54 – 3 Bac 5 – Comb – 17 –

If he refuses to testify he may be punished for contempt either by fine or corporal punishment –

It has been questioned whether if a prisoner get away from the officer on this writ it is an escape? If the officer attends him in circuitous or careless manner it is an escape if he gets away otherwise not –

There are many other writs of Hab. Cor – of little consequence but the (3 Bac 2-3 –) great & efficacious writ in all manner of illegal confinements is –

Habeas Corpus

3. ad subjiciendum - which is directed to a person holding another in custody commanding him to produce the body of the prisoner with the day & cause of his caption & detention & to do submit to & receive whatsoever the court or Judge awarding such writ shall direct -

A person imprisoned by either house of parliament for contempt of such house cannot have this writ because either house of Parliament is paramount to any court - 8 Ld R 514

By C.L. - this writ issues from the court of B.R. - Chancery & in some cases from the Common-Pleas & Exchequer - But it never issues from the two latter - but in favor of some person who is actually or by fiction an officer or servant of those courts - In case of a commitment for a crime these two last mentioned courts cannot discharge but may take bail or remand - Cro J. 543 - 2 Vent. 24 - 2 Bac. 3 - 2 Mod 198 - 2 Sid. 131 -

In Ct. one or more of the Judges of the Sup. C. may issue this writ & proceed therein according to Com. Dig. 69 -

It has been questioned whether Chancery could issue this writ in vacation - But the last decision was by Ld. Nottingham that it could not - 2 Sid. 132 - 2 Hales 147 -

But the court of B.R. may issue it in vacation - for the sovereign is at all times entitled to have an account why the liberty of any of his subjects is restrained whenever or whenever

Habeas Corpus

that restraint may be inflicted 3 Bl 131 –

When the writ is obeyed & the prisoner brot before the court he is either discharged admitted to bail or remanded – When the prisoner's application is to be discharged the only question to be tried then is the legality or illegality of the imprisonment – But if he has been legally imprisoned & is is not entitled to bail he is remanded. 3 Bl. 134 – 5 Mod 22 – 1 Vent 330-46 – Lev. 850 – 2 Ld R. 586-618

The

Stat 16 Car 1 has left it optional with the subject to demand this writ of either court of Westm hall – 3 Bl 132 – 2 Mod 198 –

The great protection of this writ is that the person need not be unfettered when the law does not require it – The benevolent aim of the C. L. having been evaded by the Stuarts gave rise to the famous Habeas Corpus act 31. Car 2 – Tho this has done little more than to restore the C. L. – In one respect it differs – that any of the twelve Judges may issue the writ in vacation & have it returned to his chambers. 3 Bl. 135-6 – 3 Ba 7. 8

But

neither this Stat – or the C. L gave it to persons charged in execution by legal process – tho it will lie where the party confining has no authority or pretense of authority Ther 142 – 10 Mod 429 – 3 Bl – 136 – 3 Ba – 9

So in favor of a child against its

This writ is not granted to enable one in custody on convictions for a misdemeanor to vote at Elections 29 C. L 136

The judgt or decision of any court or officer having jurisdiction cannot be reversed on Habeas corpus 9 Pennt 320 11 Ad & Ellis 273 1 Hill 404 3 do 658 5 do 167

parent - or wife against her husband - & a friend of the party as well as himself may have it on application - D is obedience to this writ is punished as a contempt - 3 Ba 15 - 8 Mod - 526 - Burr - 600 - Stra - 982 - 2 Lev 128 = G, N, B 68 - 12 Mod 86 B Burr 631

King Philip once consulting the oracle of Delphos received the following answer - as is said -

"Make coin thy weapons and thou'lt conquer all."

He owned that he had carried more places by money than arms, that he never forced a gate till after having attempted to open it with a golden Key - & that he did not think any fortress impregnable into which a mule laden with silver could find entrance

Proof

A. recovered a judgt. agst. B. he afterwards sued that judgt. recovered another & had exn. upon which was paid enough to satisfy the first debt not enough to satisfy the second & cert. upon dis-fac. for an exn. upon the first judgt. it was holden that the money collected on the second should be applied in satisfaction of the first judgt. upon the principle that the law applies the payment to that debt which is most favorable to the debtor 5 Wend. 222. citg. 9 Cranch 747 775 n 9 Wheat. 720

Scire Facias

1298

This writ takes its name from the words in the body of it signifying that "you come to know"

It is founded almost always on a previous judgt. & very often is concurrent with Ceff on judgt.

Sci. fa. lies in every case where an exn. is apparently satisfied: but in reality is not - as if property of the conqu. person is taken on an exn. & sold off may have Sci. fa. against Deft. to shew cause why he should not satisfy the judgt. - The same exn. cannot be levied - for it appears to be satisfied, nor can the Sheriff be awarded for the same reason & he is not to judge between the parties. 5 Mod 73

So also if a person dies in Goal a Sci. fa. will lie; not against his body but his property, or if he escapes no Sci. fa will lie against his body.

If a judgt. is obtained & exn. is not taken out within the time limited by law a Sci. fa. will lie

In Eng. an exn. must be taken out within a year & a day - or if a writ of Error has been brot within a year & a day after that is determined

A Sci. fa. will lie on a Recognizance for it is considered in the nature of a judgt. - but debt on the bond is now

Scire Facias

the more usual remedy

A Sci-fa- does not lie on a foreign judgt.

In a Sci-fa- the parties cannot go into the merits of the former action- but must avail themselves only of that which has happened since the judgt. 1 Root 183 548. Bro 8 288 Coup 728 Ind. 2 Str 1043 Hard 233 1 Sid 182. A.

It is generally believed that on a Sci-fa- neither the body or property can be attached- but the R- sees no reason for this- post. *

When an ext has been levied not with after the sale of the Pff's delivered to an officer & he has received the money of the debtor & endorsed the ext it is regard bar to a Sci fa in favor of the Ddnt on the judgt. 1 Root 192

Instead action on a debt against an Ddnt on the grounds of a special agreement. R. ot 242

When a Sci fa is found on a judgt. it is a judicial writ & must issue from the court where the record is & be signed by the Clerk. 2 Root 172. Root.

* The process on Sci. fa may be by attachment. St. 156. /1814/

[illegible]

If judg. be had agt. two & one dies. Sci. fa. lies agt. the survivor & heir & ter tenants of deceased 2 Saund 50 n 5 –

Where an exn is indorsed by mistake or accident remedy is by application to same court by Sci. fa. or motion for an alias exn & no new judgt. is rendered for costs 1 Root 453

A. Mac Haland v Irwin 8 Johns 78 So if the original judgt. is by confession or default – Hadw. 330 Coop 727. & the remedy where the judgt. is by confession is by application to the court upon motion 8 Johns 79. Coop 727 –

Probate Courts

There in this State have jurisdiction in all matters of administration, including appointing & relating guardians St. 1. 202 § 11. 1 Jan 109.

An appeal lies to the S.C. in all cases from any decree or order of Probate (St 212 § 5

In all cases where an appeal is taken the party appealing must give suff. security to prosecute his appeal to effect § St 212

An appeal must be taken to the next S.C. St 213 § 1 revised. St 213 provides —

The Court of P. may bring thro out the process of Commissioners on an insolvent estate any claim not exceeding 18. Mass 1 Pick 1 §

If a time be limited by an order of Probate for the creditors to be exhibited it will bar all claims not exhibited within that time Pick 2 129 2 Pick 184

Probate

In Eng. if a person dies leaving bona notabilia in two dioceses, administration must issue from the prerogative Court & not from the Ordinary of each diocese. Ryl. 253 Sol. Sp. 1 Str. 74

But in Ct (Lond.) if a person dies leaving goods in two jurisdictions administration from one Probate Court is sufft — qu. — Must admn. issue from the Court in the district where the testator resided & leaves bona?

Allowances made by commissioners on an insolvent estate to an admr. may be disputed in an action on the Probate Bond — 2 Root 140

Parol orders of a Ct of P not set written in evidence — Sd. for all orders of that Court must be signed by Chief Judge & Clerk 2 Root 141.2

A conditional claim is bona fide exhibit within the limitation in 2 Root 143 —

The disallowance of a P. claim by commissioners is prima facie evidence against him. 2 Root 155 1 Root 103 2 Root 143 Coxe 368

Probate.

A creditor cannot be a commissioner on an insolvent estate
2 R. T 203 T. 205

An appeal from Probate does not lie in favor of a creditor because too much is allowed another creditor by the Commissioners
2 Root 297.

Where a Court of Probate ordered a sale of real estate without finding that the debts allowed exceeded the personal estate such proceeding is erroneous yet as the Court has jurisdiction if there be no fraud the decree will be valid until set aside by appeal
1 Ct. R 467.

There may lieu a remedy on the Probate bond against the Ex^r for making a fraudulent inventory & sale of lands 1 Day 15. 16

A decree of Probate ordering a sale of lands with a return of sales & an amount given credit for the lands sold furnishes evidence that an inventory had been previously made & exhibited 1 Day 312

The decree of a Court of Probate is conclusive upon all persons concerned whether parties or not 4 Day 224 1 Ct. R 8

Moneys arising from the sale of property in one State under an order of Probate there are not assets in another State 2 Mass. 470.

1303

If one having a lien on goods causes them to be sold on his own ex^n. he loses such lien they, they are not removed from his premises 15 C L 388 So if he satisfies a title independent of a lien he cannot afterwards resort to his lien 15 Wend 474

Factors

Factor's lien £1243

Sale that a factor may deliver his principal's goods to a third person with notice of his lien as security for the same 4 Johns 103 2 Ill. 88 3 Ser. & Rawl. 70 & 290 Rosc. 34 / 1 East 4 p. 27 n

A factor in qu. is not at liberty to sell on credit goods consigned to him unless he has authority so to do in the custom of the place warranty if 1 Bay 294 2 Brooks 342 4 Dall 38 2 Caines 341 Rosc 329 & 1242 n / A. requests B. to put a certain number of Lottery tickets into the hands of a safe person to sell. B. is not authorised to sell them himself on credit – 3 Ill. 88 211.

Where goods are consigned to joint factors 3 Wils 114 the one in the nature of a bailiff joints for the whole Selw 830.

A sale by a factor creates a contract between the owner & buyer Stra 1182 6 B.S. 379 even tho he sell in a dishonest manner. Bailey 257.

If goods are bought by a Broker who does not mention his principal's name until he has become bankrupt the principal cannot set off the price of the goods against a debt due to him from the broker but is still liable to pay on 1 Bar 399 1 Camp 85 Selw 830 / Semble where the factor acting under a false credit 1 M 359 commission sells the goods as his own & the buyer does not know of any principal the buyer may in a suit brought against him by the principal set off a debt due to him from the factor as own. Semble sale to a known factor on the principal known 2 Caines 341

A pawnbroker has notion or plate after death of tenant for life who procured it as against remainmen the he taking no notice of the settlement. 2 B & P 306 1 Vern 407 2 Vern 601 3 Atk 114 Cas p 132 135 in n Bro Ch. 286

The agent authorized to sell is presumed to have power to warrant the estate sold & his principal is affected by any fraud he may practise on the purchaser 6 Wheat 338 4 JR 177. 23 Wend 260

Factors

In case of factor beyond sea an action will lie either for or against him in his own name 4 M & R 258 for the credit will be presumed to be given to him in the first case & in the last the promise will be presumed to have been made by him - for benefit of trade / Bull. 130 / the whole credit is made and as subsisting between the contracting parties 3 Bos. 490

Liens are of two kinds - particular where a person claims a right to retain goods for money taken upon the credit of them & are founded in law & gen. lien are claimed in respect of a gen. balance of accounts & are founded in custom only & taken strictly 3 Bos. 494.

this lien is an equitable interest. 3 Bos. 258 Parker & Brooman 11.

With respect to this gen. lien it will not attach until the goods come into the factors possn / 5 M & Ing 753 / & it exists only while the factor holds possn of them

Where a factor is in advance for goods by actual payment or where he sells under a del credere commission whereby he becomes responsible for the price he has a lien only on the price / altho he should have parted with the possession of the goods - Cowp. 251 / & this tho the factor should become aware when he knew the principal to be in insolvent circumstances 2 Burr 931

Where a factor has no special claim on the goods & has dealt on them the debt is considered as the principal & the factor has no lien on the price Cowp. 405 Bull / if the factor refuses to pay the principal on his

Where A. residing in one place has funds in the hands of B residing in another B. supplying A. with such articles as he wants from time to time procuring such articles as he does not deal in from others on credit & charges them to A. A is not liable to the seller of such articles altho he directs the purchase of the article which he knows B. does not deal in & the seller is informed for whom the article is purchased unless it has authorized the pledging of his credit or recognized such act - the agency in such case is special without authority to pledge the credit of the principal 3 Wend 83 1 Peters 752 5 Esp 76 Peake 47 Paley 140

Factors

then ask the contract he must be himself responsible for the amount
1 Selw. C. 2/3 7n

A factor has no lien in respect to debts which accrue previously to the time he was constituted factor 8 Bos 485. Cases P. & B.

The principal is liable under the act for his agents acts done in bona fide within the apparent scope of his authority 4 Mod 66 3 Brownl 50 3 B & C 16 The decision is just & in keeping with written instruments given from the principal & following those of a gen. agent given afterwards 3 Brownl 115 –

Holden by Holt that a merchant was liable for the debt of his factor – see que. unless the principal is in fault. Selw 834 n8 Sal 289 Ba. action on the case R.8.

A factor is allowed to testify in favor of his principal the he may be interested in the event of the suit 3 Wils 40 2 Ch R 590

Every authority given to an agent or atty. to transact business for his principal must in the absence of other proof be construed to be to transact it according to the laws of the place where it is to be done 9 Pet. 627. hence if property is sold by the agent do that by the laws of the place no title passes the buyer can sustain no action against the principal for he is presumed to know the law & buys with his eyes open

Principal is not bound by an affirmation of the unauthorized acts of his agent unless it be made with a full knowledge of all the material facts 9 Pet 629 –

A Plea of autre fois will not be rejected on account of the informal manner in which it is made by the prisoner but counsel will be assigned & time given to make it properly 25 C.L. 299. & this plea can be proven only by the record 25 C.L. 300

An indictment for conspiracy must show either that it was for an unlawful purpose or to effect a lawful purpose by unlawful means. therefore it is not unlawful to meet & combine to separate one parish from the support of poor & throw it on to another 28 C.L. 189 2 Burr 993

That branch of Municipal Law which treats of Public wrongs is called criminal Law. The Rea of the crown or crown Law. 4 Bl. 2

The term public wrongs includes all offences against municipal Law. 4 Bl. –

to crime or misdemeanors are not committed or committed in violation of a public law commanding or prohibiting it. Crime, misdemeanors are synonymous terms in common acceptation the same class of offences of the more atrocious kind – the latter term is a less opprobrious nature – Crime is an infraction or violation of a public right inherent in the community – Civil injury is an infraction of private rights. 4 Bl 5.

In almost every case a public wrong includes a private injury Ex. Battery – Libel &c. In every case it may include or produce such injury – Ex. Le public nuisance – In these cases the object of the law is to give as far as possible a two fold remedy – to the public & individual. 4 Bl. 5. 6. 7.

But if the offence amounts to or felony the private injury is generally merged at C. L. in the crime & no redress is lost. Ex Homicide 4. Bl 5. 6 2 R. M. 557 1 Mod 283. 5 Co 5 82 Bull 131

The doctrine of merger is said to be founded on the policy of the law. the object of which is to prevent offenders from escaping punishment. 5 B & Ad 77. mg°. But the true reason seems to be that the punishment for the public wrong renders it impossible for the offender to make reparation for the

A conspiracy to commit a misdemeanor is not merged in the misdemeanor committed but where the crime perpetrated is of a higher offence than a misdemeanor the misdemeanor is merged 4 Bland 265

If the owner of land erect a nuisance & let the land he is liable for its continuance. So if one purchase land on which is a nuisance he is liable for its continuance, tho the land at the time be under lease so that he cannot remove it. Quere, if the nuisance be erected after the purchase & during the continuance of the lease 28 C & 222

civil injury, it being an good as forfeiture of life & property 4 Bl.
1 Stra 873 Sa. R. 1672 –

If a crime not amounting to a felony injures an individual he has his remedy; for the punishment being left secure
leaves room for private compensation. 4 Bl. 6

In Et. the doctrine of merger seems not to have been received
Civil suits have been sustained for perjury & arson – Caldwell
vs Brands – Ransom vs Hunt –

Forfeiture for crimes here in time consonly – Destroying
mail bags of U.S. in time of peace / Manslaughter –
/ in neither case is life forfeited – Abolition ags. & wants
Ct. a former suit for subornation of perjury 2 Dall 447
Sr. Ct. 182.5.6 285.

The right of punishment for crimes is founded in the law of
nature / in some instance, authorised by the revealed law
law of God – in a state of nature it was vested in every
individual: for it must have existed somewhere otherwise
no exp.n. / 4 Bl. / In a state of society this right is vested
in the supreme power, men being no longer their own
judges & avengers. 4 Bl. 8

The right of society to punish is said is said to be derived
from the consent of its members expressed or tacit & therefore
founded on contract – This foundation is broad enough to authorise
many punishments but not all – Ex. Capital for murder prohibit
seems to make in so, for the individual cannot rule has a
right to punish in a state of nature might transfer it –

Right of punishment

1 Bl 8.9 Nat. 74 Paley M.P 341 Burlemaque 142

Consent of the criminal is in no case suff.t to authorise capital punishmt. 4 Bl. 9 Burle. 142.

But the most rational ground for this right in all offences is necessity or expediency. A sovereign state the aggregate of a moral person has attributes diff.t from those of a physical individual - diff.t rights - duties & diff.t criteria of offence - Nat. Prof. 1.7.8. 1 Wat 13 4 Bl 9. 10 Paley 249.

The end of all human punishmt. is the prevention of crimes. This end is obtained by one or more of three ways. 1st. By reforming offenders. 2d. by depriving them of the power of doing future mischief - 3d. By deterring others from offending 4 Bl 11. 12 Paley 4 34

Persons capable of committing crimes

Regularly all persons are liable to punishmt. for criminal acts to bars except such as are expressly exempted 4 Bl. 20.

All the excuses from punishmt are reducible to one. the want or defect of will. To constitute a crime there must be a will & intent concurring - Nemo mens nisi mens rea. Sans intention considered as a civil injury 4 Bl 21. 1 Hawk 2.

Defect of will in three cases. 1st. Where there is a defect of understanding as an infant come infra. not capable of distinguishing - But if the fact is one exception infra not generally punishable at C. L. the of the case of discretion. 1 Hal. 20. 2 4 Bl 22.

A. Boy under the age of fourteen cannot be convicted of an attempt to commit a rape for he cannot be found guilty of a rape itself except as a principal in the second degree 14 C & P 367 –

But where a M. authorized any one or his servants to assist persons stealing the master's property & to take them further before a magistrate & a servant assisted the deft in adjoining field with turnips which had been stolen from another field of his master & proceeded with Deft to his master's house & thence town – the constables & on the way the deft killed the servt – held not to be murder – for the servant not proceeding on the statute required was not protected by it 14 C & P 368

The age of discretion is now 14 years in all cases the presumption is in favor of the infant. But between 14 & 17 this presumption may in capital offences be rebutted. This is laid down by 4 Bl. 23 with respect to felonies only. 1 Hawk. 2. 1 Hal. 27. Foster 72. Qu. Why not an infant under 14 be punishable for breach of peace, riot, or common misdemeanors? 4 Bl. 22. 3 Sent. not. qu. Rex 257 qua Ded —

Idiots & Lunatics are not punishable for their acts while under their incapacities. Sense of Lunatics if they offend in a lucid interval. 4 Bl. 24. 3 Inst. 6. 1 Hawk. 10. 4 B. 65. 81. 1 Hawk. 2.

A person deaf & dumb from nativity may be tried & punished even for a capital crime if ideas can be conveyed to him by signs. Leach 106 394 2 Hal. 317 2 Hawk. 462 4 Bl. 32. 4 Mc. N. 158

If one commit a capital offence before arraignment become insane he cannot be arraigned — if after arraignment he cannot be tried — if after verdict aggt. him — no judgt. — if after judgt. no exn. 1 Hawk. 2. 3 Inst. 4. 6 1 Hal. 10. 34. 370. 4 Bl. 24. 394 If doubtful whether the prisoner is now compos the fact must be tried by a Jury —

He who invites or incourages to do an act is the principal — the offender. 4 Bl. 35. 35. 1 Hawk. 3. 8. 1 Hal. 617 1 Leyngs 63.

Voluntary intoxication is no excuse, but rather an aggravation — Habitual debility of mind produced by a long course of intoxication Sem. Sent. 1 Inst. 247 4 Bl. 25. 6 1 Hawk. 2. 3. 8 vs. Hood 19 4 Co. 125 1 Hal. 32 So also if the intoxication is produced by force or fraud & presume —

2a. There is a defect of will where the understanding

A Justice called on to suppress a riot must do all that he knows to be in his power & all that can reasonably expected of a man of honesty ordinary prudence & under the circumstances. More honesty of intention if he fail in his duty or that he acted on the best professional advice is no defence 23 C L 227

the suff.t. is not excused because the is neutral Gen.l rule. If one commit an unlawful act by misfortune or chance he is excused — for there is no defect of will — But if one voluntarily doing an unlawful act does unintentional mischiefs he is not excused. 4 Bl 26.7 1 Hawk 5. 1 Hal 39 4 Co 124 1 Roly 123 —

Ignorance or mistake in point of fact excuses: here being no ~~[illegible]~~ defect of will. Dens of a mistake in law because here the will concurs with the act. Co.l 538 4 Bl 27 7 Bl 514 Plowd 343 Bacy 4 167 1 Burr 35 1 Hawk 5.140 1 Hal 42.3.

3a. There is a defect of will arising from compulsion or necessity: Here the will does not approve it. Ex. If the Legislature make a law commanding an act contrary to religion or morality the subject is excused in obeying for he acts under the obligation of civil subjection 4 Bl 28.

A feme covert is in many cases excused from punishment when she does an unlawful act thro the coercion of her husb.d or which is the same thing when in his company. Ex. Theft. Burglary / 10 Rule 63 Roly 31 / 1 Hal 45.7 4 Bl 28 / But if she commit the crime voluntarily or by the bare command of her husb.d she is not excused / Are not theft & Burglary made in Sec.s 4 Bl 28.29. 230 241.242.

In case of Murder Treason / & it is said of robbery / the coercion of her husb.d does not excuse her / 1 Hawk 2. 1 Ba. 294 4 Bl 29 n 1 Hal 47 Roly. 311 qu as to the robbery for

Compulsion &c

tis said 4 Bl 29 Ch. — that the wife is excused in all felonies except Murder & manslaughter 1 Hal 47.

But a child or serv.t is not as such excused for any crime committed by command of the parent or master 4 Bl 28.9 1 Hawk 3 3 Rol 34 Moor 813 1 Hal 44 1 Hawk 44 ind 1 Burn. Bl 29 n.

Duress per minas excuses among unlawful acts as treasonable acts excused by compulsion of enemies or rebels 4 Bl 30 1 Hal 50 1 Hawk 5.

But this holds chiefly with regard to positive offences only not as to malicious offences — as killing an innocent person to escape death 4 Bl 30 1 Hal. 51

So in case of legal compulsion the will is also perfect as when an officer of the law is bound to make an arrest & if resistance is offered — killing may be justified 4 Bl 31 1 Hal 53.

Stealing food or clothing to relieve extreme want is not justified by L. L. ~~4 Bl 31~~. 1 Hal 54

Principals & Accessories.

One may be a principal in an offence in two degrees. One in the first degree is he who is the actual perpetrator & in the second he who is present aiding & abetting the actual perpetration — According to 1 Haw. the offenders in the last case are principals in the first degree

The crime of accessory before the fact to a murder is murder & is not barred by the St Limn. 4 Mand 256

1 Russell Cr 51.

4 Bl 34 Doug 197 1 Hal 315 Plowd 99.100 2 Rus 441 258 325 qu. 2 Mc. N 23. 527. 1 Hal 487 4 Burn 2075

The felonious accompany to make a principal in the second degree need not be an actual standing by with sight or hearing; constructive presence suff. Ex. keeping watch at a convenient distance 4 Bl 34 Hast. 350 Doug 197 2 Mc. N 339.

So aid or assist a person unknown will make a principal in felony - Hawkins, however, made to stat. felonies, on letters pat. to L. Leach 291 2 Mc. N 25. 34

Even a constructive presence is not necessary always to make a principal in the first degree Ex. Preparing forging & exposing it &c. here the offender is principal in the first degree 1 Bl 34. 35 Hal. 52 Fost. 349 3 Inst. 138 1 Hall 607 2 Hawk. 443 315 4 Co 44 qd. 81.

A special verdict finding only that the felonious non feasance is not suff. to warrant a verdict ought. him. 2 Mc. N 327. 31. Hal 77. 7 11 Burr 2073

An accessory is one who is not the chief actor in the offence nor present at its perpetration but is in some way concerned in it either before or after the fact. 4 Bl. 35.

In High treason there can be no accessories, all concerned are principals as accessories of the activity of the crime. Besides the bare intent to commit treason is in some cases treason itself 4 Bl 35. 36. Inst. 138 1 Hal 613 2 Hawk 439 440 1 Lev. 57. 12 Co. 81. 82

Whatever will make one an accessory in felony will make him

Principals &c

a principal in high treason / 4 Bl 35 1 Hawk 58 2a. 439 3 Inst 138 / formerly questioned as to accessories after the fact 2 Hawk 440 12 Co 81. 82 Dy. 298

There may be accessories in petit treason Murder & other felonies except those which in judgt. of law are unpremeditated as manslaughter in which there can be none before the fact. In all crimes under felony there can be no accessories - all are principals. 4 Bl 33 B. 191 1 Hal b 15 2 Hawk 441 1a 115. 32 Mor b 61 1 Inst 59. 1 Sid 312 Cro C 750 12 Co 81

An accessory cannot be guilty of a higher crime than his principal Co. A Sent. causes a stranger to murder his master - Sent. being absent - Sent. is accessory to the crime of murder only - But if Co. had been present & aiding he would have been principal if Petit treason & the stranger of murder only 4 Bl 36 3 Inst. 134 1 Hawk 132 2a. 445 Dy 128 332 Mor 91 1 Hal. b 15 -

Accessory before the fact is one who procures, counsels or commands another to commit the act he himself being absent at the time the act is perpetrated - Absence is necessary - Same he is a principal 1 Hal b 15 4 Bl 36. 2 Hawk 445 Plowd 475.

He who abets another to an unlawful act is an accessory to all that ensues upon it, but not to any thing substantially distinct from & not ensuing from it. As if A. commands B. to take C. & he beats him till he dies, he is an accessory to the murder but if A. commands B. to burn C's House & B in doing it robs the house he is not an accessory to the robbery. 4 Bl 37 2 Mc. N 337 1 Hal b 17 2 Hawk 446 Plowd 475 Foster 370

To solicit one to commit a felony / Sedo. / or any other offence is a

Accessory before the fact.

1820

misdemeanor if the crime be not committed 3 East 581 2d. 5. Willes 101 2 Show 1 Le R 137).

If the act the intends before the act is done he is not an accessory Bacon. 2 Hawk 445 5 East 51 1 Hale 237 East 354 Plowd 475.

Statute felonies well as those at C. L. and not of misdemeanors the the H. is silent as to them – the former [illegible] incidents of C. L. felonies.

The law considering the intent to felony is wise to be only a misprision of felony which is punishable only by fine & imprisonment. Persons who are present when a felony is committed & are not aiding or to prevent it or apprehend the felon are guilty of a misdemeanor – fine & imprisonment – except in favour of infl. 2 Hawk. 442 c. 115 Hawk 8 East 36 1 Hale 127

Accessory after the fact is one who receives relieves comforts or assists a felon knowing him to be such But the assistance must be given with an intent to hinder public justice, as to prevent a felon from being arrested tried & convicted – But to relieve a felon in gaol with the consequence is no offence. 4 Bl 37. 8 1 Hale 618. 20 2 Hawk 448 & 4 188 Kel. 45. 77.

Receiving stolen goods knowing them to be such made no accessory at C. L. it was a mere misdemeanor. Sacer le Ks. 2 Hawk & Co. 2. 1 Hale 620 1 Bl 38 2 Hawk 450 Cro 688. Hawk 5 Kel. 4. 5. 1 Hale 68 By an H. 648 the receiver is made a principal the felony is not to be considered at the time of assistance appears to be a felony – 4. Hale. [illegible] assistance given before death. 4 Bl 38 2 Hawk 451 1 Hale 1. 219 622.

No attainder except that consisting of treason & felony & assistance given to a felon 2 Hawk Bilkerson no one Not the wife – nor the ground of pardoned [illegible] 4 Bl 38. 1 Hawk 451 1 Hale 621 3 East [illegible] Hawk

Accessories after the fact.

If one is indicted as accessory to two principals, proof that he is accessory of one is suff. by 11 Co. 2 Mk. N. 240.

Gen. rule of C. L. that the accessory suffers the same punishment as the principal: but accessories after the fact are by St. in most cases allowed the benefit of clergy. 4 Bl. 39. 3 Inst. 188.

It was formerly holden that an accessory could not be compelled to answer, till the principal was attainted. Now he cannot except by St. be tried unless he desires it, till the principal is attainted or unless the principal is tried at the same time. But by St. 1 Geo. & 22 Geo 2. the accessory may be tried as for a misdemeanor in cases where the principal has not been attainted or convicted. 4 Bl. 132. 2 Co. 117 2 Hawk. 453 4 Bl. 40 323 Leach 18 117 353.

If the principal is acquitted the accessory is discharged. If the principal is convicted or pleads guilty the accessory may be tried as principal if the first attainder is unreversed the reversal. 2 Hawk. 452 1 Hale 623 4 Co. 43. 9 Co. 119 1 Rol. 777.

But the death or pardon of the principal after attainder does not avail the accessory. The at C. L. the death of the principal before attainder the after-conviction discharges the accessory. Lemmon by St. 1 Geo. 1 Hawk. 453 Cro. E. 541 4 Co. 43 4 Bac. 4 Ty. Dy. 120 4 Bl. 323 Leach 184

If one is acquitted as accessory he may be indicted as principal. But if he is acquitted as principal indictment whether he can afterwards be indicted as accessory before the fact tho as accessory after the fact he may be. 2 Hawk. 430 Rel. 25. 26 4 Bl. 40 Bac. 331. But that he is guilty as accessory will not support an indictment. exp. him as principal. 2. Hale 290

In indictment exp. one need not state that the principal was [illegible]

Accessories after the fact

the offence. Suff. to state that the principal was convicted &c. & then charge the principal as company - yet the accessory can shift inquiry the after conviction of the principal convicted the guilt of the latter either in point of fact or law & strike may do when both are tried together 7 Th 64 65 1 Ld 1 25 2 Ld N 464. 3. C. Fort. 365. 121. 2 Hale 456 4 Bl. 324 9 Co 118 Leach 263

Felony is an offence which at C.L. occasioned forfeiture of goods & land rights - The term is generic not signifying a particular crime but a whole class of offences - Term of Chancery Manslaughter &c 4 Bl. 94. 95.

Originally the word did not denote any crime; but the penal consequences of certain crimes - it was afterwards used to signify the offence working the forfeiture & by an easy deflection to denote offences working a forfeiture of goods &c. only 4 Bl. 95. 97.

Treason is strictly a felony - carrying a forfeiture & was personal confined under that name but is now drawn by itself. 1 Hawk. 99 4 Bl 94. 95. 97. 98 3 Inst. 15.

Capital punishment is not strictly necessarily a consequence of felony - the clergy allowing for murder. Ex. Self murder &c. vid 4 Bl 25. Qu. 1 Hawk 114 / 146 2 Bac 476 1 Ld N 208 2 Lists 10. So also some capital offence are no felony. Ex. Heresy at C.L. 1 Hawk 99. 4 Bl 95. 97 3 Inst 43

All felonies which are punishable with death work a forfeiture of all lands in fee simple & of goods & chattels. Others of goods & chattels only 4 Bl 97. 1 Inst 391 4 Bl 387 388 14. 239.

But by gen. usage the word felony is now made to imply but -

a capital crime if indeed to include all capital below treason 4 Bl 98

Hence if a St. creates a new felony the law implies that it shall be punished with death as well as forfeiture. So contra if the St. expressly annexes capital punishmt. to any offence that offence is in construction a felony. But if a St. prohibits an act under penalty of forfeiting all he has, it is only a misdemeanour — no offence can be made felony by doubtful ambiguous words 4 Bl 98 1 Hawk 168 1 Hal 127. 41 703 1 Inst. 391 2 Ba 469 4 d. 644 Hob 270. 93 1 Hawk. 107.

Crimes which in Engd cause forfeiture are in Et. called felonies tho no forfeiture ensues in lat one case Felicia — Mansslaughter St. 285. 182. 185. 186. 555. 557

Clergyable offences are those in which the benefit of clergy is allowed — There is a species of felon in effect exempting felons the consequence from punishment of death — But their goods are forfeited by conviction & are not restored. 4 Bl 333. 65 1. Hale 213 2 Ba 236 4 Bl 373. 87.

At Co. L. Fees allowed in petit treason & in most capital offences tho not in all — Not in high treason petit treason or murder. St. 1 Ed 6 c 12 in most capital offences is sanctioned by 25th Ed 3 c 4 & extended to petit treason 2 Chas 4 & 2 Hal 372 4 Bl 365. 7.

Lunatics are entitled to this privilege but not. Idiots or those who commit a clergyable offence — Allowing it for any particular offence the felon is discharged for ever not only of that offence — of all clergyable offences before committed Hale 174 4 Bl 373 2 Hal 375 Hob. 4 Hen 7 & 1 Ed 6th —

Felony

At present in Eng.d clergy is allowed in all offences felonies whether by St. or C. L. unless expressly taken away by act of Parliament 4 Bl 373 2 Hal 330.

Benefit of clergy was formerly pleaded in Eng.d as a declinatory plea - now prayed before judg.t after conviction - usually 4 Bl 332. 2 Hal 238 - No is not of clergy in St.

Homicide is the killing of any human creature & is of three kinds. Justifiable - excusable & felonious. 4 Bl 177. 1 Hawk. 100 104. 101. 115. 3 Bac 641

Homicide is not therefore necessarily criminal the first has no guilt - the 2d. very little in judg.t of law & only a nominal punishm.t 4 Bl 177. 188 Post. 283. 2 Hawk 539 id. 108. 109.

Justifiable homicide is that which is occasioned by necessity as when a sheriff executing the duties of his office executes a condemned malefactor. 4 Bl 178 1 Hawk 105 Legal necessity

But in this case the law must require the act to be done & it must be done by the person whom the law requires to do it or by his deputy - If a private person upon tumult & voluntarily kill a man he cannot plead it is murder 4 Bl 178 1 Ca 449 501 3 Bac 674 1 Hawk 106 -

The offic. - executing the sentence of death must pursue

Justifiable homicide

the sentence or he is guilty of murder, and if he be heard when the sentence is hanging, to no purpose. 4 Bl 179 3 Bac 674 2 Mo. N 559 Finch 31 1 Hawk 106 1 East 128 1 Hal 501

The sentence must be by a Court of competent jurisdiction or the Judges who render & the officer who executes the sentence are guilty of murder. 4 Bl 178 3 Bac 674 10 Co 76 1 Hawk 105 130 1 Hal. 497 Foster 5 Co 106 Moor 333 Co 98

But if the Court have cognizance of the offence & pass sentence of death where the offence does not subject to it the Judges only are guilty for this is not common judge. 1 Hawk 106 3 Bac 674

2d. It is justifiable in certain cases when committed for the advancement of public justice - As an officer meaning an arrest is resisted & kills - dispersing riot, &c. this last holds of private person who are ordered assistance in pursuing the command of law - 4 Bl. 179. 1 Hawk. 109 1 Hal. 98 Foster 66 2 Mo. N 559. 570 1 Hal 494 3 Bac 674 & Co 68.

So if a warrant felon resists or flees from bailiff or any private person without warrant. 1 Ch. 577. 285. 1 Hawk. 108 2 Mo. N 559 Hort. 271.

So if an innocent person indicted for felony resists the officer bearing a warrant - Bacon if a private person without warrant attempt to arrest an innocent person upon suspicion. 1 Hawk 106 Hort. 38 2 Mo N 572.

It is also justifiable when an officer attempting to make a lawful arrest in civil case, is resisted but if deft cannot be taken alive - So in many other cases to prevent crimes fra or rescue. 1 Hawk 107 1 Roll 189 Hort 270 3 East 56 Star 499 Hort. 293 294 2 Mo N 566.

3d. Justifiable to prevent any atrocious felonious crime or

Justifiable Homicide

to rob or murder &c. Same of crimes not accompanied with force as picking pockets - mere breaking a house in the day time. 4 Bl 180. 181 3 Inst 65.
1 Hawk 108 109 1 Hale 48 b. 7. 93. Kel. 137. Foster 271. 275 H. C. L. 285 5 & 2 Mc N 5 b 2

It is not justifiable when merely to defend his home person or goods from a mere trespass; tho, if the trespass is against the person it may be excusable as a defence - 4 Bl 180 Kel. 132 Foster 273 Cro C. 538 1 Hawk 108. 113.

If the trespass was against his property only it is manslaughter. So if he kill some breaking his window without against his person 1 Bulst 48 / in a civil case. May it not be homicide se defendendo in the least case if he cannot escape death: without great bodily harm? 4 Bl 185

Rule. When the crime itself is capital attempted with force that force may be resisted even by the death of the party - here the homicide is justifiable. 4 Bl 181 H. C. 285 577.

A woman may lawfully kill one who attempts with force to violate her chastity. - So husb. or servant may kill the ravisher / so may any other person behoofe 1 Hawk 108 109 100 4 Bl 181 Foster 274 1 Hale 488 Kel 137 2 Mc N 56

According to older opinions justifiable homicide may be specially pleaded - but according to later authorities it must be given in evidence under the gen. issue - always agreed that the offence cannot be pleaded. It is however not permitted at all, not even manslaughter. 1 Hawk 105 3 Inst 675 1 Hale 478 4 Bl 182.

Excusable. Difference between this & justifiable homicide is, the first consists the second bare fact 4 Bl 182.

This is of two kinds, per infortunium & se defendendo / self defence - the first is merely involuntary; the 2d involuntary but committed from motives & under circumstances constituting a defence - or offence. 4 Bl 181 1 Hawk 111 1 Hale 438. 111 393 492 471. 3 Inst 676 -

Excusable Homicide

1st. By misadventure happens when one doing a lawful act without any design of doing hurt involuntarily kills another. Lawfulness of the act is essential; as using an axe the head flies off &c. 1 Hawk 111 1 Hawk 472 Fost. 258 4 Bl 182.183 3 Ba 471 Rel 148.164.65 Fallace 287 Hein 668 Rel 133.134 2 Mc N 256

So if an officer punishing a criminal: if the beating be outrageous it will be manslaughter at least. If either an instrument dangerously endangering life, murder. 1 H. 80. But if death ensue in consequence of an unlawful act which is malum in se the action is guilty of manslaughter at least in some cases, murder - if the act is a felony, and if it is manslaughter if felony it is murder. 3 Ba 676 1 Hawk 112 Hob. 134 4 Bl. 183 192 1 Hawk 472. 73 Fost. 258. 92. Hea 499 Rel. 117 1 Hawk 126. 1 5.

If one accidentally kills in the exec. of a malicious deliberate purpose to do him personal harm it is murder. So also if it be the consequence of an unlawful act the natural consequence of which is bloodshed. 1 Hawk 112 4 Bl 200. 193 Rel 117. 13 1 Hawk 47. 4 5.

So if one do an idle act which must necessarily endanger the life of some one & accidentally kills it is manslaughter. Ex. throwing stones at another in sport - But if death happen in consequence of any lawful sport it is misadventure only - Ex Foot ball, wrestling &c 1 Hawk 112 131 Hea. 481. Fost. 261. 4 Bl 183 2 Mc N 254.

2d In self defence obtain when one in a sudden affray kills his offender - this is distinct from that which is committed to prevent the perpetration of a capital crime - it is said to be material whether the first blow &c 4 Bl 183 4 3 Ba 677.

But to excuse this kind of homicide it must appear to have been upon the very footing or at least probable means of preserving one's life or of escaping from great bodily harm. 4 Bl 184.5 3 Ba 677. 1 Hawk 105 113 Rel. 126 2 Mc N. 368 Fost. 273

Excusable Homicide

When it is to preserve one's life it seems nearly absolute justifiable homicide committed to prevent the commission of a terrible or atrocious crime. It is difficult to distinguish this from mutual manslaughter. Rule If both are striving for victory when the mortal blow is given if it is premeditated Sheet if the slayer has not begun to fight or having been others to decline & cannot without danger to his life or great bodily hurt it is no defendendo. 4 Bl 183 Foot. 270. 3 Bu 677. 1 Hal 481 2 Foot 296 Ed. 51

According to some the aggressor himself when pressed to step & trying to escape his assailable in killing to save his own life. 3 Ba 177. 8 Ed tolen contra Saub. for it is his fault. 1 How 113 1 Hal 479 80. 3 Ed. 58. 6. Foot. 270 Co. 78 4 Bl. 185. & if one strike with malice prepense & known flee & tried to decline fight the other to save his own life it is murder 1 How 113. 23 Ed 58 129. 28.

If both agree to fight a duel & one being thus pressed kills the other to save his own life it is murder 1 How 122. 112 3 Ba 577 & Ed. 29 4 Bl 185 1 Hal 443. 79 & the same rule holds in case of fighting in pursuance of an unjustifiable assault where it is not one continued act & fighting. 1 How 125 112. 22 Ed. 117 1 Hal 39. 45 Saub.

To the minds of him who kills in a duel are murderers & according to others those also of the one slain 4 Bl 199 1 How 124 1 Foot 314 1 Hal 443 3 Ba 65. 6.

This excused self defense extends to the civil & natural relations as husb & wife, parent & child &c. The act of the relation is contrary the act of the parts. A stranger may justify to prevent a felonious or capital crime. 4 Bl 186 1 Hal 184. 6 3 Ba 568. 6 & 1 How 125 Ed 61.

Killing an officer who attempt to arrest the slayer in the exec. of his office is murder the warrant be erroneous or defective upon the face of it. 2 No. & Ed 455 5 61. 62 455

No one can excuse the killing another by clearing his innocence or

Excusable Homicide

or self defence. It must appear in evidence under the gen. issue. 3 Ba 17.5 1 Hal 478 1 Hawk 185.16 8 St 24.5 1 Inst 283.

Lord Coke 2 Inst 148.315 says that excusable Homicide was formerly punished with death - deriently later written 4 Bl 188 1 Hal 425 1 Hawk 114 Inst 282. The punishment seems currently to have consisted of a total or partial forfeiture of goods & chattels. If total the offence would have been felony which in 4 Bl 98 it is said to be. It seems to be still felony tho not classed with felonious homicide because not capital. "Felony" being used as synonymous with a capital crime 1 Hawk 115.

But as for bail or Eng. records extend the party ever has been & still is entitled of course a right to pardon & restitution of goods indeed the Eng. Judges usually secure or permit an gen. verdict of acquittal. 4 Bl 188 Inst 283 288 2 Hawk 535 id 115 Rec. 58.

Not every one in excusable homicide became not felony. 2 Hawk 447 1 Hal 411

Felonious Homicide

is the killing a human creature without any law or justification & may be committed by killing oneself or another 4 Bl 188 1 Hawk 102. Homicide by killing oneself is called felo de se 4 Bl 189.

Felo de se is one who deliberately puts an end to his own life or commits any unlawful malicious act the consequence of which is his own death - Eg. One attempting to shoot another the gun bursting kills himself. 4 Bl 189 1 Hal 413 1 Hawk 102 8 Inst 54

If one request another to kill him & he is done the former is not felo de se but the latter is a murderer 1 Hawk 102 Alleyn 76 & persons to be felo de se must be compos mentis & of sound discretion as in other cases of felonies 4 Bl 189 1 Hal 411.412 1 Hawk 102 8 Inst 54

If one knowingly & maliciously attempt to cure another & perform an operation which kills the patient he is not guilty of manslaughter whether he be a regular practitioner or not 14 L & 493, 497 overruling 4 Bl. Ch 14 1 Ve. P.C. 429 & 4 East. 251

Felonious Homicide

This admits of an excuse before not after the fact as if one persuades an other to do the act, he is guilty of murder 4 Bl 189.

The consequence are, ignominious burial in the highway forfeiture of all goods & chattels - Escheat of lands for there is no attainder 4 Bl 190 138 1 Hawk 203. Foster 216 1 Hawk 413 Plowd. 263. 59. 62. 323 Kay & Dong 624

2d. Killing another without justification or excuse or in attempting it or without malice 1 Hawk 115 Foster 255 4 Bl 191 Hence two kinds of manslaughter & murder. 1 Hawk 115 4 Bl 191 198 1 Hawk 446 Foster 256

Manslaughter is the unlawful killing another without malice express or implied & is either voluntary or involuntary 1 Hawk 446 4 Bl 191

No excuse or before the fact because unprovoked & sudden 1 Hawk 115 4 Bl 191

Voluntary If two persons fight upon a sudden quarrel & one kills the other it is manslaughter - So if they immediately go out one side to fight - for it is one continued act - Foster 296 Kel. 54. 34 Leach 157. 158 2 Hawk 463 4 Bl 191

Then diff. from duelling in duelling there is previous malice or intent to murder - So lawful in previous agreement the fight generally 1 Hawk 112. 122 Kel 56. 131

If one attempts to part others fighting upon a sudden affray & is killed it is murder - Provided the party endeavor to give notice that the object was to part them. Else manslaughter Kel 66 114 1 Hawk 132 Foster 310 273. 76 81. 6 2 Mod 561

If one be greatly provoked by the misconduct of another or be suddenly in a rage & immediately kills him it is manslaughter generally 4 Bl 191 Kel 135. 1 Hawk 117. 125 1 Hawk 472 But if suff. time have elapsed for reflection to cool it is murder. So in every case of homicide upon provocation. 4 Bl 191 Foster 296 4. 5. 6. 3. 6 Kel. 27. 56. 2 Mod 56. 1 Hawk 4 Kay 212 1 Foster 158

So if on a sudden provocation one executes his revenge immediately but in such a manner as manifests a deliberate intent to kill or do great bodily harm & death immediately ensues it is murder Q. Tying a lot to the tail of a horse &c. 1 Hawk 126 Kel 131 Salm. 545 Kel. 127 1 Hawk 252. 73 Foster 292 4 Bl 199 2 Mod 56

If one takes another in the act of adultery with his wife & kills him instanter it is manslaughter in the

All who are present at a fight from which death ensues if they do nothing to prevent it are guilty of manslaughter for remaining there tho they neither say or do any thing in an encouraging of the transaction 2 Ld 302.

Manslaughter

Johnson

One set to watch a ~~house~~ house breaker is not justified in shooting another who comes into it in the night even if he should see him go into the room room unless from the conduct of such party he has good reason to suppose his own life in actual & immediate danger he should first attempt to apprehend 11 Ld 407

If one driving with unusual rapidity drive over & kill another he is guilty of manslaughter tho he call repeatedly for him to get out of the way if the person cannot from any cause get away 11 Ld 408

Voluntary. Manslaughter

lowest degree 4 Bl 191 Kel 137 1 Hawk 125 1 Kent 158 1 Hal 466 Ry 112.

Base words, jactans, breaking prisons, treasons on hands &c. is prevent a suff. provocation to reduce stolen killing even to manslaughter where the killing is voluntary & the manner of leaving evidently endangers life. Seem if it appear from the manner of leaving that he only intended to chastise or that the killing was unintentional Kel 131. 3 Inst 55 4 Bl 200 1 Hawk 124 Kel 55. 60. 132. 135 2 Ale N 557. 647 1 Hal 454. 6. 73 Cro E 779 Noy 171 Port 316

So if in an affray between Lt & S. Ch. friend interpose & unarmed Lt kill S it is manslaughter only there being no malice prepens. / S. not bound to quit Kel 186. 61 1 Ch. 97 Port 313

Manslaughter on a sudden provocation differs from homicide in this. In the latter case absolute necessity for self preservation - in the former there is no necessity it is a mere act of revenge 4 Bl 184 192

Involuntary - manslaughter is always unintentional but proceeds from some act unlawful or unlawful manner in as it differs from homicide & misadventure in this, the latter arises upon the commission of an lawful act. Port 258 2 Ale N 553 4 Bl 192 1 Hawk 112 Comp 830

If death arise upon an act malum prohibitum the rule is the same as where the act is unlawful 1 Hort 259 1 Hal 475 2 Ale N 553.

If one accidentally kill another when engaged in any sport or reward for playing it is manslaughter - thinking an unlawful act 4 Bl 183. 92. 3 Inst 56 1 Hawk 472 Port 261. 92 1 Hawk 112 Hob 134

So if one act in itself lawful is done in an improper manner for he ought to the circumstances of the act he is guilty of. Throwing a stone into the street in a city the law takes notice of it. 4 Bl 192 Kel 40 1 Hawk 112 Hale 481 1 Hal 472. 5 Port 263. 292. 2 Ale N 556.

If the unlawful act be a trespass merely the killing is manslaughter only. If felony it is murder. Cutting other at rep.

Manslaughter being a felonious offence is not punished capitally in the first instance in Eng. - but the offender forfeits all his goods & chattels & is burned - not his land because not corp. tat. 4 Bl 189 387

In Ch. it is punished when voluntary by forfeiture of goods & chattels to the state - whipping, branding, & imprisonment to give security or evidence. Involuntary not written - nor Ill. but at C.L. it is involuntary manslaughter is in Ch. Letter misdemeanor. Stille & Rogers. 1800 — 4 C 288

But voluntary manslaughter may be still punished here as at C.L.

Murder

Wh is the unlawful killing of a reasonable creature in being under the peace by one of sound mind & discretion with malice aforethought either expressly or impliedly 3 Inst 47. 4 Bl 195 1 Hawk 118 1 Russell the numerous applied to the act of accidental killing another for which the Civil action lies from the Ecclesiastical court 4 Bl 194 5 1 Kaus 117 Ral 121.4 1 Hal 447 Fost 281 3 Bac 661

Voluntary manslaughter proceeds from sudden passion allied from wicked disp & malice 4 Bl 190.

Of sound mind &c. to meet every offence can be to be punishable 4 Bl 20.25 -

Vis unlawful & forcible injurious killing without express or express of the same is actual killing - An assault with intent to kill is merely a misdemeanor unless for merely murder 1 Hal 475.6 4 Bl 196 3 Bac 664

Not only directly & forcibly taking away life as by a blow is within the definition but also cut the probable consequence of which is death & which eventually occasions death & if wilful & deliberate is murder. By Poisoning &c 4 Bl 196 3 Bac 662 Palm. 548 1 Hawk 118 Star 834 Leach 141

So if a man who carries out his wife further in order to forty reason so for a woman who left her child in a field exposed only with leaves which was stricken by a Kite. So if Parents officers who strike or dirt about until it killed &c. this killing is murder 1 Hal 434 1 Hawk 118 4 Bl 197 Palm 545 Leach 141 So if a child drowning that a prisoner has an intention drown unless him with another who takes it & does so if he conceive the prisoner is an unhealthy room claiming his mother disappointed so that he dies 1 Hawk 119 Star 484 96 3 Bac 663 Bl R 1578 1 Hal 466. 1 So if a mother & Sec 1 Hal 432 suppose this offspring die neither fire nor water in so that he dies 4 Bl 197 Cbw

So if a person having a beast mischievous 1 Hal 432 suffer it to go out long to seem to frighten people & it kills 4 Bl 197 If he permit it to go out of his hand he is guilty of manslaughter. If he turn it out to frighting of murder Palm 431 4 Bl 197 1 Hal 430 6 1 Hawk 118 3 Bac 663 -

So in some cases where the actual killing is by another as if one incites a madman to kill another or boys for in Ch. & B. Stephens it 1 Hawk 118 Rol 434 Cro 81 of a check of imprisonment. unless one to ~~kill another~~ or one another of a crime also is accessory in his judgment. St. 14 Ed 2. 1 Hawk 118 3 Inst 91 1 Hal 431. 6. 42. 6 3 Bac 663 Rand of Rol 503.

Whether killing in mutual with intent to take away one life is murder or killing only amount to murder at C. L. if the was a duel be

If a H. authorize one to apprehend another & in the exercise of this authority he is killed it is murder in all who participate in the act whether his authority was known or not 14 Cl & 364.5.6 1 Russ 652 Russ & Ry 99

indamned & executed qu. It was so by the second it C.L. there no instance has been executed for many ages. Lewis 44 Foster 32 4 Bl 196 1 Hawk 119 & Foster 48

S. 4 Geo. 2 c. 25 leaving false witness wilfully & with intent to take away life punished with death.

If a physician gives a potion to cure & it kills it is homicide by misadventure only. But it has been held on that if the person is not a regular physician it is manslaughter at least. qu. 4 Bl 197 4 Foster 25. 1 Hale 430 3 Bac 664 1 Hawk 131

But no person can in law be adjudged to have killed another unless the death happen within a year & day & in computing which the whole day on which he is to be reckoned the first. 4 Bl 197 1 Hawk 119 3 Bac 664

2d if one dies within that time it is no evidence that he might have survived & might live but if the wound be not mortal & the party be killed by surgeries & not by the wound it is not homicide, but this must clearly appear. 1 Hawk 119 3 Foster 53 Kel 26 1 Hale 17 1 Hale 428 3 Bac 665.

A person indicted for a stabbing or killing is not indictable for an battery & stabbing & wounding &c. but may be tried upon the indictment in civil actions as if the wounds be given to an age child &c 4 Bl 196 3 Foster 319 2 Hal 183 2 Hale 320 2 Hal 271 9 Co 67.

But if second are indicted, i.e. as giving the blow & B. as aiding & abetting is acquitted that B gave the blow & i.e. as aiding &c. will maintain the indictment. 1 Hal 119 2d. 292 9 Co 67 112. 4d. 42 1 Hawk 98 2 Hale 322. 3.

The indictment must state that the prisoner gave the deceased a mortal wound or bruise. I suppose where the wounds are violent, as by stabbing &c. sufficient poisoning Hawk 98.

Reasonable creature in being & under the queen. Killing by bailors are within the rule. Killing any person except an alien enemy within the realm may be murder. 4 Bl 197 3 Foster 50 1 Hal 433 3 Bac 665 1 Hawk 121

Killing a child in ventre sa mere is a great misprision only - it not being in esse natura for the purpose. 3 Bac 665 4 Bl 198 1 Hawk 121

Misprision is a high offence under the degree of capital but heavier than an 4 Bl 119 Kel 71 1 Hal 374 1 Hawk 86

But if the child be born alive & afterwards either - as gives a blow or else wounds receives in venter sa mere it is murder according to the latter opinion 4 Bl 198 1 Hawk 121 3 Foster 50 - 1 Hal 433. contra

Indictment charging the murder by cutting the throat is held to be confined to the throat as generally understood & not to that part scientifically known as Leake 256 6 L 458

To constitute the offence of cutting with intent to murder it is not necessary the wound should be mortal or in a vital part or of such a nature as to be likely to cause death 11 6 L 398

Murder

"Without premeditation" in the definition of human sacrifice not covering the penalty of a madman, death &c — Inciting a madman to kill himself is murder 1 Hawk 118 1 East 431 C. 42. C.

If one wounds another to kill a child in utero so mere & being force it is killed in performance of the compulsion he is amenable to the murder. 1 Hawk 127 Dy 18C 3 Inst 51. East 127 1 East 419.

By 21. Jac. I. St. Ch 30 if the mother of a bastard child endeavor to conceal its death by burying it privately or in any other way the is deemed guilty of murder unless she can prove by some witness at least that it was born dead. 1 Hawk 121 3 Bac 665 2 Mod 81

The contention practically gives to the St. here & in Eng. makes nevertheless to mother immediate presumptive evidence at least that the child was born alive. 4 Bl 198 2 Bac 303. 304 East 32 2 Hawk 619 2 Mod 882

St. St. now repealed & the punishment is setting one gallows &c vide St. 302. 303 & 2.

"With malice aforethought express or implied" - grand criterion - not deadly spite or malevolence to the deceased but any evil design in gen! - The dictates of an evil wicked & depraved mind. 2 Mod 518 4 Bl 198 East 2.6 2 Roll Rep 461 East 126.

The court not the jury another judge of such but it must amount to malice so that the facts being given the point is a question of law. East 1449 3 Stra 773 Bac 596 474 477 3 Bl 428 2 Mod 547

Malice implied is express or implied - limited to express when one with a deliberate design to kill or otherwise injure some particular individual does kill him in pursuance of that design - Of this intention being in mind - formed in some one evidence. 4 Bl 199 1 Hawk 451 1 Hawk 121 3 Bac 666 East 129. 30

Some express malice appears to be that which is in point of fact mere with the act of killing - but perhaps these words are merely inferential in law. 1 Hawk 122

2d When one kills in consequence of unlawful intimation unmixed with all manslaughter - Eg. Shooting into a crowd &c. 4 Bl 200. Bac 6 East 261

So in the case of deliberately killing it is necessary that

If the provocation is so recent & strong that the accused may be considered as not having at the moment master of his understanding the offence will be manslaughter hence if reason has had time to resume its sway 256. L 331

Said in 3 Camp 76 that if one attempt to procure an abortion it is immaterial whether the drug administered is noxious or not or whether the woman be with child or not – contra 14 C L 479 & that it is no offence if she be not with child

the other attempted first or that he was after the challenge intended to fly or that he had intent to kill but sudden fire the evidence raises it as a case of malice. 1 Hawk 122 2 East. 14 1 Roll 36 3 Inst 171 1 H. P. C. 22 4 Bl 199 Kel 2 38 Inst 381 Bac 2 6 2 Hale 466.

So the second of the persons killing one guilty of murder or manslaughter is one Mere of the deceased party - que. 4 Bl 199 1 H. M. 124 Foster 414 1 Hal 445. 51

Giving a challenge not C. L. a high misdemeanor. 3 Inst 381

If one upon no provocation or any slight one suddenly attacks another with him it is murder for assault for no man should lose his life in such a manner as this and if homicide ensue - the malice towards the slain - 4 Bl 200 that this implies malice - que. what is malice? It is implied malice express Kel 27. 50. 127. 1 Hawk 124 Foster 2

So generally it is an act done against a sudden provocation one hot another in a cruel unusual manner & by him it is murder by express malice 4 Bl 199 1 Hal 454. 73 Kel 127. 1 Hawk 126 East 131 Patens 545 -

So if one committing a breach of the peace accidentally kill an officer of the peace who attempts to suppress it he is guilty of murder or manslaughter as a private person acting in his own officious way & not as a peace officer. But the object of the interference must be made known except of a known officer acting within his authority or it will amount to but manslaughter. 1 Hawk 12 Ba 1 Com 2 Hal 52. 3 3 Inst 52. 46 Co 40 Co 68 Foster 308.

2d. Malice is implied when the killing is the consequence of an unlawful act intended either to do bodily harm to some other person from that of killing the person killed or if one shoot at a fowl with intent to steal. 4 Bl 200 1 Hawk 126 Kel 19 40 1 Hal 475. 74 Moor 88 1 Hawk 101 3 Bac 467 But the intended act must be felony or the killing will amount to manslaughter only. 3 Bac 474. 1 Burg. 256. 2 553. 452

One giving poison to a woman to procure abortion & it kills the woman malice implied 4 Bl 201 1 Hal 429 que. Is the act intended felony?

Husband & his wife a poisoned apple to kill her & she unwittingly gave it to her child & both died it was to be implied malice in Hawk. 1 Hawk 126 Hawk 474 3 Inst 51 Co 81 Foster 555. 1 Hal 456 441. Co 2 Hal 554. C. Foster 261 2 111 Co 12 1381

If one kills a officer in a struggle to escape from an arrest it is murder. East 115 2 Hal 550 Hawk 126 1 Hal 86 1 Hal 463 Inst. 2 135. 308

Where the death is occasioned by a wound it is not necessary to set forth either the length breadth or depth of such wound 25 6 L 442

In the last case it is [illegible] that the [illegible] not tried by being [illegible] the [illegible] the offender act before for what [illegible] be worth. If the [illegible] is a public one [illegible] not should be indicted before [illegible] 1 Co. 44. 8 Hart 135. 311 Co. 1 250 486 2 Hale 574

All homicide is presumed to be malicious: the mens prohibit is rather annex. 4 Bl. 201. 9 Co. 69. Hart 253. 1 Hale 124 Ref. 27 112 2. Hale. 1 516 / Hence all homicide is murder [illegible] justified - Hart. [illegible] 1 Co. 2 Equal on the ground of murder [illegible] or self defence - 3 c. Allowable with manslaughter by being after the consequence of some unlawful act not amounting to felony or offending by some indirect indictment. 4 Bl 201

If several are engaged in a premeditated unlawful act & one of them in ex. of such design kills a third person all are guilty of the murder - but if the killing is not in ex. of the design & the others do not aid or connect to it then the slayer is only guilty of the murder - so also if the unlawful act be not premeditated, as in a sudden affray. 1 Hale. 1 527. 1 Ry. 54 Ed 118 Hart 351.

Death is the punishment of murder - signifying it was designed & that unknown Hades one was murder capital. Now of 3 Geo. 4 c. 23 4. 8 Geo. 4 c. 45 Pl. ill. charge is [illegible] from unknown [illegible] abetting [illegible] & [illegible] - but they cannot be extend to charge an after the fact. 4 Bl 201. 1 Hal 450. 334. 2 Hawk 631. 488. 1 Hart 53. 2 Hal 319.

By our St 361 it is enacted - that the [illegible] by [illegible] till be in law 2 Hawk 631 2 Hal 319 3 Inst. 53. 211 4 Bl 403.

A woman convicted being capable with child ex. is delayed till she be delivered - the it is no offence for not pleading or for stay in judg. Real a corpse for this crime could have lost [illegible] 2 Hawk 638. 2 Hal 413 4 Bl 394 3 Inst 58 Foster 1 48

Ex. if not complete till the convict be dead - one second convict be hanged [illegible] 4 Bl 404 2 Hal 412 2 Hawk 638 Foster 1 167 -

Note. When one murder an officer endeavoring to arrest him the prisoner is not bound to show that the endeavors were an officer otherwise than by stating that he acted as such officer / 1 Hale 366. 2. Hale 485 / qu. May not the prisoner then show that he was not an officer?

Erections of every kind adapted to sports & amusements having no useful end & notoriously fitted up & continued by the owner with the view to his profit are common nuisances 5 Hill 121 1 Marsh Ch 32 886 1 Mod 76 2 Ld 846 12 Mod 342 10 do 235 3 Burr & Ell. 184 2 Burr 1163.

Petit treason

There are certain instances in which murder being more than ordinarily heinous is denominated Petit treason - It is created more as a term than an offence in its most comprehensive sense 4 Bl 202 Foster 115 324 336

At C.L. many offences were called petit treason which are not now anything by an express act. 1 Hawk 141 3 Inst 20. 1 Hal 379 82 5 Bac 140 - Now by 25 Ed 3 c. no offence can be petit treason except in the following instances - 1st. When a man kills his master - 2d. Wife her husband - 3d. Ecclesiastic his prelate this cannot obtain here 5 Bac 141 4 Bl 203 1 Hawk 131 2 Ld Raym 574.

It is called treason because of the violation of private allegiance in addition to murder. 4 Bl 203 Foster 107 324 36

Killing a husband's wife is not petit treason unless under such circumstances as killing any other person would be murder 5 Bac 141 1 Hawk 132 Dy. 254 1 Hal 378.80 for it implies a murder 2 Ld Raym 574.5

If a person disguised murders his husband - traitors - Burn's criminal law 4 Bl 203 1 Hal 380 1 Hawk 133 n 5 Bac 141

If a wife procures a stranger to murder her husband she being ignorant she is accessory to the murder only. But if a stranger procures the wife to do it he is guilty of petit treason. 5 Bac 142 3 Inst 20. 139 1 Hal 24. 1 Hawk 132 Dy 128 332.

Murder of one master by another's wife is petit treason the act within the St. 25 E. 3. 5 Bac 142 3 Inst 20 Plowd. 86 1 Hawk 132.

So murder of one who has been master of one making one's wife in service before in exp. of a treasonable intention. 1 Hawk 122 Plowd 260 1 Ro. Rep. 6 Bac 142 4 Bl 203.

Murder of a father by a child is not petit treason unless by ~~man~~ reasonable construction the father be a serf. 1 Hawk 13 3 Inst 20 1 Hal 380

This was originally doubtful but by 31 H 8 c 426 P. & M. doubt is taken away from under a construction - those of P. & M. take it from a person after the act. 4 Bl 204 5 Bac 141 1 Hawk 133

Principal in case of a murder - treason to the prince changed - for female - accessory 4 Bl 204 1 Hal 382. 2 Ld Ray 574 - 3 Inst 311 2 Hawk 6 & 1 Ro 135

Ten years is limited for petit treason in the Criminal Court of murder 1 Hal 379

In an indictment for arson the house burned must be described as the house of the person in possn.

3 Ch. 1104 2 East 1034 Lev 6 376 2 Lutw 105 1 Str 162.

Arson.

This is the malicious & wilful burning of the house of another. It includes not only the dwelling house but all other outbuildings within the house-curtilage. A barn or stable may be the subject of arson. 1 Hal 220 1 East 566 C.L. 3 Inst 66 2 Co 188 Sav 218 1 Lev 20 1 Ken 165.

To a barn filled with corn is within the definition the not personal fire. Burning a stack of corn was anciently within the act now. 4 Bl 221 1 Ken 165. 3 Inst 67

Burning the frame of a house is not arson because not within the meaning of "house" - but burning a person in arson because within the reason of the protection which arson is. 1 Hawk 166 1 East 568 3 Inst 67 1 Burrow 287 Sav 67.

Arson may be committed by burning one house if that is found that it be burnt in consequence of it - but then the house commits in burning that of the other for if one seized for an - term of years of a house situated at a certain house was other, & burnt it is not arson. 4 Bl 221 East 567 Sav 217. 19 1 Ken 166 1 Sav 351 Hut 116

But if one so seized in a town burns his own with intent to burn that of another but actually burns his own only it is not arson. So if he is possess under an agreement for a lease for years - or if he be tenant from year to year. 1 Ken 166. 1 East 568. 4 Bl 221 Ke 29 Hut 115 Bro & Co 338 Sav 235

But the wilful firing one's own house in a town is a high misdemeanor - like imprisonment, pilling & sureties for good behaviour - the indictment in this case should not be for arson. 4 Bl 221 1 East 568 1 Ken 166. Ke 29

If a landlord or reversioner burns his own house while in tenant's possession it is arson - for it is free to tenant - the tenant's house. 4 Bl 221 Hut 115 1 Ken 166

Arson in Ct. is substantially the same as at C.L. except that by act 30 the burning or attempting to burn any state house - county house town house church or meeting house school house dwelling house barn out house store shop stack or other spell is arson 4 Bl 221

Burning what? Neither an barn intent to burn or an actual attempt to set fire is an burning if no part be consumed (Contra 4 Cl 361) But the actual burning of any part is that be of sufficient or go out of it. 1 Ken 167 1 East 570 3 Inst 66 4 Bl 222. Russell 605.

Arson

It must be malicious or it will amount only to a trespass — burning thro' neglect or accident is not arson. 1 Hawk 16 — 1 Hale 569 Plowd 475 4 Bl 222.

Yet if one maliciously intend to burn A's house wrongfully & accidentally burn B's it is arson because of the felonious intent. 1 Hawk 167.

Arson at C.L is a felony unattended with death. In the reign of Ed. I burning was not clergyable — It seems to me to have been entitled to clergy but was taken away by 21 H. 8 which being repealed by 1 Ed 6 — It was ousted again by 14 & 15 H. 8 c. 4. 4 Bl 221. 2 Hawk 481 503 deemed also to be a felony, before the Lateby c. 25 Ball. 4 Bl 222.

By new St 301 "Any person shall wilfully burn the house of another" (if the life of a person be lost or endangered) St 29 (the rest) — death. But if no life be thereby lost or endangered the person on conviction in a middle shall be confined in Newgate at the discretion of the J.C not exceeding 7 years — for the 2d offence — Newgate for any limited period or for life — But according to the gen. rule (if the second offence must be committed after conviction for the first) 1 Hawk 168 1 Hale 324. 70 85 Ly. 323 2 Bulst. 349

If a female confinement (St 301) in the com. work house or gaol in the county in which she offends for the same period as middle, in Newgate.

Qd. the word in this St. "attempt to burn by setting on fire" mean mere burning or falls within the C.L definition? It seems that they do — if so it may be forgotten that the burning furniture be the first St 29 — impute be total. Sedqu. I conceive that the partial burning of a house comes within the first St. the same act is contemplated in the case of a stack as in that of a house &c.

Burglary

: the act of breaking & entering into the mansion house of another in the night season with an intent to commit a felony. 4 Bl 224 1 Bur 335 3 Inst 63. 1 Hawk 159 1 Hale 549 2 Ed. 360

It seems not absolutely necessary that the breaking should be of a mansion house. Of walls of a town or church — 4 Bl 224 1 Hawk 162 1 Bur 335

The property of the antient being a mansion house obtains in the case of a suitable building only — The definition ought to include the walls of a town & churches. 2 Mod 300 4 Bl 225 1 Hawk 162.

Burglary.

The mention of the word "mansion" seems inexpressible in the indictment when the breaking is of a private house. Semble not semb. 1 Hawk 162 1 Bac 335

The term "mansion house" includes all out buildings which are within the curtilage or home stall being protected & privileged by the capital house. 4 Bl 225 1 Hale 558 1 Hawk 163. 3 Inst 64 Rec 27. 52. 57 1 Bac 33 Poole 42. 52 Leach 320.

This curtilage seems to be that portion of ground enclosed with the house by one common fence or connected with it directly by a fence: therefore an out house 8 feet distant separated by an open passage & not within or connected by any fence enclosing both was adjudged not within the curtilage. 1 Hawk 163 n. Leach 145 1 Hale 558

Sodering in a private house of the owner does not burglarize it; or if he enters by a different door in the mansion house of the burgler. Semble if the owner lodges in it & enters by the same outward door - there is only one mansion house: that of the owner. 4 Bl 225 Hale 3. 4. 27 Barton Compl. 2 Hale 332 Leach 90. 230. 364 278. Barton 1 Hale 556 1 Hawk 163

An uninhabited house cannot be the subject of Burglary Leach 190

If a lessee or tenant within his curtilage & lets it to a servant or lets part to lodgers in it, burglary cannot be committed in it because no longer mansion house. Being occupied by the lessee - nor by the servant lodger in it. 4 Bl 225. 1 Hale 558 1 Hawk 164 1 Hutt 33 1 Bac 335 1 Hawk 164 n.

A house in which one usually sleeps tho' left for a short time continues a mansion house. The owner is in it all the time fe. So also of a house one has, tend to reside in & that part of his goods into the house which lodger is in it. 4 Bl 225 1 Hale 556 Inst 55. 1 Hawk 162 1 Hawk 166 Rec 52. 57. 40 46 49 Poole 40 Roy 276

The house of a corporation is within the definition 4 Bl 225 Leach 57 Inst 38. 9 1 Bac 3

It cannot however be committed in a tent or booth these being temporary 1 Hawk 164 at sup.

By 8 Geo 2 c 19 Burglary may not only be at L. & but by breaking a sledge. in which was goods worth 5s. the at a distance from & not lodged in it.

Ruled in 1 Rus 63 that the value of a chest containing goods may be the

Burglary

subject of burglary — It is essential that the name of the owner of the house be inserted in the indictment. 2 Leach 243

Night season. Formerly it might be committed at any time between sun & sun; but now the time includes only the time between the evening & morning twilight 4 Bl 224 1 Ba 333 4 Ca 224 1 Hal 350 3 Inst. 63

It is said that if there be suff. day light to discern one's countenance clearly it is not night & within the definition — but it must be dark in twilight & not moon-light. 4 Bl 224 1 Ham 160 & 606. 1 Hale 324 2 Ller N 602

Manner — If the breaking & entering incent. took place at one time a breaking on one night & entering on another is suff. 4 Bl 226 3 Leach 342 1 Hal 551 Rol C

Breaking may be not only by attempting open a door; but by breaking or taking out a pane of glass; pulling or knocking a latch or unlocking any fastening. 1 Ller N 601. 2 1 Bl 226 1 Ham 160 1 Hal 505. 2 Y. 6 P. 5 Rich. Burg. Batt. 20 Bat 10

So coming down a chimney, for it is as much closed as the thing will admit. But breaking fixtures in a house, as cupboards chests &c is not within the definition. Leach. Bat 108. 4 Bol 31 1 Hal 527. 2 Ller. N 605

Entering by an open door &c is not a breaking within the definition. Same. Breaking outward be breaking an inner door &c. Sup. 4 Bl 226 1 Hal 527 2 Ller. N 601 1 Hal 553 1 Ham. 160 Rol C. 1 Leach 13 — Quere if one opened a house with intent to rob & on the owner opening it with intent to drive him away he enters it is a breaking — the opening being examined by the felonious intent. 1 Ham 161 4 Bl 226 1 Ba 333 2 Ller N 602 Ba 213 — Cantlow's Case. 115.

In case of one entering without breaking or without the owner's consent whether a breaking out is a breaking within the Co. definition the authorities are not agreed — But by H. 12. Henr. 7 indicated to be so. If the entry be before the breaking — Or taking goods with felonious intent or killing one in the house without such previous intent be committed a felony & breaks out. Sessions — Latter cases if he goes out without breaking 4 Bl 227 1 Hal 554 1 Ba 333 1 Ham 160

To admit of looking into a dwelling house in the day time it must be granted that there was day light sufficient to distinguish colours, fractions 11 6 6 398

11 6 6 398

Burglary

Entry forcibly found with intent to steal is burglarious, as being let in under pretence of business & then stealing. So a housing are office to enter under pretence of searching premises & then stealing are there is a breaking the opening locks unknown by the felonious intent & the bars is not thereto be secured. 4 Bl 226 1 Hale 161 Rel 42. 52. 62. 82. 1 Hal 552 3 Inst 64 1 Bac 333.

If a serv. opens a writer his master's chamber with intent to steal or a Lodger in a private house or shop of another door of another with intent to steal it is a burglarious breaking & entry of the warehouse house of the proprietor. Rel 15 63. 65 2 Ill. N 601 4 Bl 227

So if a serv. in the house unofficer with robbers to let them in by night that they may rob all are guilty of Burglary. 4 Bl 227. Hale 881. 1 Hal 555 1 Hale 162 2 Ill. N 604

Entry. The least entry with the whole or a part of the body - attempting in an instrument or weapon - discharging a gun &c is a burglarious entry. 4 Bl 227 1 Hal 553. 5 Rel 104 1 Hale 161 Rel 67. 1 Bac 324 2 Ill. N 603.

But it seems the instrument must be introduced for the purpose of committing a felony - as a hook to draw out the goods &c. Leg. Pitt &c to demand one guinea 1 B. 1. 86 The loosing a lock the window & that there were keys on the inside was not a complete entry: because not introduced to take property. 1 Hale 164 Leach 342 or to have an intended for the purpose of taking property

Also qu. as to the case of turning a key of a door locked on the inside. Ibid 1 Hale 162 1 Bac 334 Leach 342

So an indictment for breaking & stealing &c Ind. may be guilty of the breaking & committed of the stealing. Leach 84

If several joined in a conspiracy a burglary & some stand at a distance & watch while the others break in all are guilty of the Burglary. 1 Bac 334 1 Hal 80. 1 439 555 1 Hale 162 Rel 350 Rel 111 2 Ill. N 604

Intent. To constitute Burglary there must be a felonious intent. From the breaking &c as a mere trespass. 4 & 9 Geo. II. in a case where a servant returning returned to the house in the night time no may. 4 Bl 227 1 Hale 164 Cro 99 Rel 30. 67 1 Hal 562 1 Bac 336

So if the act be a H. & not a C.L. felony: for a H. felony has all the properties of a C.L. felony. 4 Bl. 228 Hale 481 1 Bac 336

N.B. It seems that the intention should be executed - intent alone

Burglary

is suff. of this the Jury are to judge 4 Bl 227 1 Ham 139 1 Hal 549 2 a. 360 Hal 109 1 Ham 336 1 Ham 165 n

After one has been acquitted on an indict. for breaking the house & stealing the money of A he cannot be indicted for the same breaking & stealing the money — but for the theft he may be. Hal 30. 52. 2 Hawk 47

Punishmt. Burglary is a felony at C.L. but clergyable — Nov. death clergy taken away by 1 Ed 6 & 12 Eliz. & from imprisonment by 3 & 4 Wm & M. but these sts. do not extend to a person in after the fact. 4 Bl 228 1 Ham 165 2 Hal 561 1 Ham 336

In Ct. for the first offence Newgate (St 297. 8) if for more not exceeding 3 years — for the second not exceeding 6 years — for the 3d. during life — If in the perpetration the burglar kills any person or uses violence or is armed with any weapon or clearly to indicate violent intentions. Newgate during life for the first offence (St 299 § 2.) By "dangerous weapon" I suppose is meant weapons of death "Violent intentions" I do not say any one who shall offend in this kind of burglary being an offence at C.L. may be prosecuted as such & that the St. only points out a mode of punishmt. 1 Hal 559

Females are imprisoned in a common work house for the same offending & length of time as males are in Newgate

Larceny

or theft is of two kinds. Simple & mixed. Simple is a felonious theft unaccompanied with any aggravation. Mixed or compound is the reverse, in it the aggravation of taking from the house or person of another. 4 Bl 229 1 Ham 134

Simple larceny is the felonious taking & carrying away the personal goods of another. 4 Bl 229.

If the goods are above the value of 12 pence the offence is grand larceny if the value is only or under 12 — petit larceny — 1 Hal 503 Hal J 121 4 Bl 229 4 Bac 476 1 Ham 134 45. 6

If goods — to the value of 12 pence are stolen by several at one time it is grand larceny 1 Ham 145

To constitute larceny in one to whom goods have been delivered on hire there must not only have been an original intention to convert them to his own use but a subsequ^t actual conversion

An actual to convert is not suff^t 24 & L 396

In that case the hiring was to go to one place & he went to another & there offered to sell the property the accused was acquitted because no actual conversion but qu. how not the going to a diff^t place an actual conversion?

Simple Larceny

Stealing 12 pence at several times from the same person, not grand Larceny
1 Hale 145 n Leach 265: dd but contra 1 Hal 53 2 Rol 719
The difference between grand & petit larceny is in the value of the goods
hence the rules laid down with respect to simple, apply in gen.
to both heads; the they differ only in regard to their punishment. 1 Hal 224
1 Hale 146 Post 3.

Taking — Must be from the possession either actual or constructive 4 B 223 1 Hawk 135 n.

Gen. Rule that every felony includes a trespass. hence if the goods
of no trespass be come by quietly & peaceably in taking away — gen
2 Hale 506 2 Bac 472 Kel 81. 84 1 Hawk 134 4 B 230

A constructive poss. is a right of present possn. hence if one find goods
he constructive poss. in order to it not larceny: but generally no poss.
under an delivery from the owner is good nor to be guilty of larceny
in embezzlement. Hawk. Ex. le carriers of goods sold &c. 1 Hale 480 Cro
489 7 Co. 2 Bac 272 4 B 230 1 East 108 1 Hawk 134 n 1 Hal 504

If one obtain a delivery without intent to steal & convert away or embezzle
the article it is barring: for it was found upon legal title he can lose
no advantage. the possn. in law remains in the owner for the time
instant it is sold & delivered, the contract therefore the owner
retains the poss. in law for the taking & the moment it is to be
lost beneath steal & that an entire & whole of one dealing the contract
as extinguished when there is otherwise a right of mutual rescind.
1 Hawk 16 Lowe 355. 75 2 Str 91. 91 2 Bac 453 1 East 108 Hob 3 18 Cro 254 2 Hawk
689 Roll 276. 6 Saund 1 the future must be by the property was
sold & delivered, hence the poss. is parted with both in law & fact
Leach 401. 475. 338

So obtaining goods from an office with intent to steal under a
false pretence, or by a false & fraudulent representation, obtaining by fraud with the
Ignorance is a felonious taking for the right & property are vest
2 Bac 453. 1 Hawk 136 1 East 108 Kel 48 Leg. 274

Gen. Rule. When the delivery is for a certain special purpose Leach 142
the owner retains a right of consent & the delivery the poss. is in
the owner therefore embezzling or using fraudulently is a felonious
taking — Ex. le bailee makes embezzlement or wrongfully converts to his own

If the only evidence against a prisoner charged with a larceny be that the goods were found in his posn. three months after they were lost the Jury will direct his acquittal without calling on him for his defence 14 to L 474

Where goods are obtained under a purchase through fraud & false pretence tho the sale is void yet it is not larceny 5 Hill 294 8 Cow. 238 yet the Court in 5 Hill say that were the question now in that Court it would follow the Eng cases which are the other way 1 Mood Cr. C 179.

Simple Larceny

Corporeal. O.B.779. Clothes delivered to be washed /O.B.758/ Guineas delivered to be changed. O.B.778.

In these cases a felonious intent to steal seems not to be supposed. But perhaps being in the owner taking as with a felonious intent is a felonious taking from the owner /1 Hawk. 135. 6/ would the taking in these cases be a trespass as above?

So also of goods delivered for safe custody /O.B.774 1 Hawk. 136 n. Kel. 81. 2 Cro. 294 & qu. therefore as to the gen. rule supra Leach 242 549 & 36.

2 Mich. 1788

It seems clear that if a carrier having received the goods to the p. carry them away animo furandi the taking is felonious tho' there was no felonious intent originally for the Bailment is determined & he is a mere stranger. So if he take them to a different place from their original destination & there embezzle them animo furandi. So also in case of a living. But the carrier shd. abscond & goods & take away part, or pretend a robbery it is a felonious taking for as some say the law will presume in the goods (qu.) tho' the law will the thing containing them. Leach 481 230 because the animo furandi is recent & 1 Hawk. 135. 6 because pos. of part argument for the whole is gainst the wrong. Kel. 83. 2. 1. 3 Inst. 108 1 Mod. 505 2 Bac. 473 Leach 358 mag. 2 Mich. 1789 / The true reason seems to be that the pos. is all the time in the owner. Kel. 83 Leach 242

If one sells a horse to another who immediately rides away with him upon the delivery with the vendor's consent it is not larceny whatever the original intent may be for there is an absolute pos. in the vendee. Leach 401 2 Mich. 1792.

If a lets to B a horse & B rides away with him it is not larceny 4 Bl. 230 1 Hawk. 516 but the original hiring must be bona fide & the intent to steal subsequent. Leach is larceny Leach. Leach 213. 358 4 Bl. 230 / The true reason in the first case is Bailment / that the embezzling pos. is not in the bailee for bailees might to countermand. 7 th. of Leach 213 358 401 2 Mich. 1793.

Suppose that after the time for which the hiring was, the bailee concealed animo furandi? Leach 2 n.

Where according to the terms of the Bailment the bailee has a right to countermand at the time of once in the interval in consent be

If one from an idle curiosity either personal or political opens & keeps a letter addressed to another it is no larceny tho the great part of his object be to prevent its reaching its destination it must be done with an intent to gain some advantage - Lucas case - 34 E. L. & S. 25 Wandling Gallagher case R. & R. C. C. 292

It is felony for a man who elopes with another wife to take his goods tho with the consent & at the solicitation of the wife 6 Coke 57 Dalton Sum. Ch. 157 Rusf. 27 -

Simple Larceny

10

larceny unless the bailee was obtained with intent to steal. E. 4. Mr. Lucies for La Roche was tried in a case by Leach 358 Lord if the bailee according to the terms of the bailment has a right to retain the goods for hire is a sufficient defence the not in the first case.

If the bailment was obtained with intent to steal it is always larceny. But the case non delivery of goods by bailee to bailee is not of course evidence of a felonious intent even in those cases in which larceny arising from it is larceny for it may happen from various other causes. 4 Bl 230

At C.L. if a servant running away with goods committed to his custody it was not larceny but a mere misfeasance - breach of trust. But now by 21 H 8 it is larceny if the goods are of the value of 40 shillings except in apprentices & servants under 18. 4 Bl 230 1 Hale 504 2 Bac 474 1 Hawk c 33 s 38

Qu. Why does not the first case come within that of the 21st Hen 8? Ans. . . Lord Coke - as to the rule at C.L. Does not the term indenture change in modern times?

But at C.L. if the servant had not the possession but the master was a sleeping running away with a mere taking is a felonious taking. 4 Bl 231 1 Hale 504 1 Hawk 34 Mod 246 Pole 84 Rol 55.

If goods are stolen from a third the second taker is guilty of a felonious taking from the owner for the property & possession in law are in him 1 Hawk 33 2 Bac 473 2 Ld Raym 1589.

So if one steal goods in the County of C. & carry them into the County of B. he is guilty of a felonious taking in B. & may there be prosecuted for every removal with intent in the offence of taking is a repetition of it. So also he may be prosecuted in C. 1 Hawk c 33 s 38 1 Rol Ab 9. 2 Bac 47 Semble if the original is in a foreign State 1 Hawk 37 2 Mod 119. 22. 116. Contra 2 Salk 477. 479.

It is not larceny to receive goods abandoned from the house of the owner Leach 447

Carrying away. is the goods removed from the place the asportation is the essential - as leading a horse out of the stable 4 Bl 231 2 Sinclair 119 1 Hawk 140 2 East 215 1 West 508 Rol 31 2 Bac 474 Rol 103 2 Ld Raym 1024. 47

To convict of receiving stolen property it must be shown that the property was stolen by some other person to the knowledge of the prisoner 25 L & 25.

Indictment for stealing a turkey means a living turkey 11 L & L. 342. so of any animal - if it was killed when stolen it must be so stated -

Where property is lost without any mark indicating the owner & the finder at the time did not know the owner he is not guilty of larceny altho he fraudulently conceal the same immediately afterward with intent to convert the same to his own use 1 Hill 94 14 John 294 17 Wend 460

Simple Larceny

Felonious taking of goods and land is not a carrying away because not removable: but taking it from a house out of a close is a felony. 1 Hawk 141 n Leach 224. Q.

Felonious. The taking or carrying away must be felonious i.e. animo furandi, there those wanting nevertheless are opinion 2 cases trespasses - as taking cows plough without leave & using & returning it - the intent is to be determined by the Jury 4 Bl 232 1 Hale 509.

Otherwise one takes personal goods from the poss.n of another act. his will the taking felonious & felonious & felonious & felonious appear Leach 203.

Personal goods of another. Things real or annexed to the realty not the subjects of larceny - Land cannot be moved but trees & growing are not within the law as they adhere to the freehold - but if they once severed & taking away by one entire act, because then they become moveable or moveable in the poss.n of the owner actual or constructive. It is larceny made larceny by 14 & 15 Ge 2 c. 4 Bl. 232 Leach 208 2 Ba 1170 1 East 187 1 Hawk 141 1 Hale 80 1 Hale 509. 12. So if severed at one time & carried away at another whether severed by the th. or some other person but if taken away they are personal in the owner poss.n 4 Bl 233 1 Ro 440 3 Inst 109 1 Hale 141 2 Ba 1170 1 East. 187.

The reason for this distinction may be that things fixed to the freehold are not so easily taken & not so liable to be stolen 1 Hawk 142 4 Bl 232 the reason so severed that laws are not necessary as to them. Cited 2 Ba 1169 diff. reason - not so valuable

Taking charters of land it is said is not larceny for they relate to the realty are muniments of the freehold & descend to the heir & yet from a title for them 2 Ba 1170 3 Inst 109 1 Hale 11. 510 4 Bl 234 Hawk 145 Leach 1 Taking wolf from a living wild animal is not a larceny & land & goods a cow Leach 181 2 Hale 593

The goods must be of some value in themselves & some one must have a property in them hence the taking of chases in antient

An indictment for receiving stolen goods alleging that they were stolen by "some evil disposed person" is good without stating the name of the thief or that he is unknown 25 Ga. 330

A person picks up an article whom he knows that he can immediately find the owner & converts it to his own use it is larceny 25 Ga 432 qbt.

Simple Larceny

in action cannot at C.L be larceny; of no intrinsic value but merely by relation to the right of which they are an evidence & this right is not property in poss.n — Under Larceny by 21 Geo 2. 4 B 234 Co 35 1 Hawk 142 2 Ba 470 — Contra 1 Bul 66 / 2 Ba 470 / Foxwell. H.C.L.

Taking animals fera naturæ & not tamed cannot at C.L be larceny there of intrinsic value. Seem if they are not tamed & unfine, & yet for ~~[illegible]~~ 1 B 235 Pal 364 1 Bul 511 2 Ba 471 1 Hawk 143 2 B 393.

The taking such animals from natura as will not serve for food will not at C.L be larceny the engineer for or respects this they are considered of no value But criminal action will lie for the taking 1 Hawk 512 1 B 235 2 a 39

But the taking of a tame bird is larceny at C.L as well as by H 3 Ed 3 c 2 Ba 471 1 Hawk 143 3 Inst 109 quæ at C.L 1 B 236.

But domestic animals may be valuable tho not serving for food & subjects of larceny. 4 Horse &c. Seals & those which do serve for food 1 B 236 1 Bul 511 1 Hawk 144

Some domestic animals not deemed valuable in law as bats &c. to take them is not larceny; tho it may be criminal to poss. 1 B 235 2 a 393 2 Ba 471 1 Hawk 143.

Under certain Eng. Sts. excluding charge in certain cases of goods wares & merchandise stolen in money is to be deemed to fall within that description. Seals 43.56. 234 403.

"Of another's goods". But those of joint owners the owner at the time of taking are not the subject of larceny — Ex. hair & things sold & pre they are seized by those leaving the right. Then at the time the property is in dubio or rather in no one; it may be in the things or in certain cases be restored to the owner. 1 Hawk 144 1 Hawk 512 1 B 295 297

But there must be a property in some one at the time yet it is said the owner need not be known & the indictment lies for stealing the goods of a person unknown & the thing shall have the goods. 1 B 235 1 Hawk 144 4 y. 99 1 Hawk. 512.

But it is said 2 Bul 290 8 Mod 249 that at the trial unless the property is proved to be in the stranger it shall be presumed to be in the finder 2 Mod 280 1 B 352 1 Hawk 145 n

Where property is levied on by an offr the acquirer a special property in it if stolen by the owner or gen. property man or any one else it may be laid in the indictmt as the property of the offr 10 Mend 165

One pretending he wanted change for a crown received it & then run off retaining both crown & change Held to be larceny of the change 18 6 L 453

Simple Larceny

Stealing the goods of a private church is larceny: for they are the property of the parishioners - So also is stealing a shrouded from a dead body as it is the property of him who was the owner at the time it was put on: but stealing & taking up the body is no larceny they are indictable of course. 1 Hawk 145 3 Inst 110 12 Co 113 & 1 Hale 33.

A person may be guilty of larceny in taking his own goods. Eg. One delivers goods to a carrier or pawnbroker secretly & fraudulently takes them away with intent to make the bailee liable - So if he sold his own property with intent to make the buyer liable. 1 Hawk 145 3 Inst 110 Co 8 586 4 Bl 231

If B's goods are bailed to B & C steal them it seems that he may be indicted generally or for taking B's goods. 1 Hawk 145 O.B. 785 Ld 129

On an indictment for larceny if a felonious taking is not found the Court cannot on a special finding give judgment against Deft as on a trespass. 1 Ld 129 Leach 7.

Punishment. Simple larceny of bottle liquors is at C.L. felony but within the benefit of clergy which however is in many instances taken away. 2 Bac 475 1 Hal 69. 1 Hawk 146 4 Bl 95 7 2 Leach 19 1 Hal 208 4 Bl 237. 8 1 Hal 12 3 Inst 53 2 Hale 189.

Petit larceny is punished with forfeiture of goods & chattels & whipping or other corporal punishment not with forfeiture of lands because not capital By 4 Geo I. transportation for 7 years. 1 Hawk 146 3 Inst 218 1 Hal 70 530 2 Bac 47 4 Bl 95 237

In Ct. no distinction between grand & petit larceny - fine not exceeding $7. & if the value of the goods amounts to $3.34 whipped not exceeding 10 stripes. if of the value of $.84 & under $3.34 whipped not exceeding 10 stripes on failure to pay the fine. If under $.84 no whipping - treated as amounting to the offence St. Ct. 547. 548

Mixed Larceny.

This has all the properties of simple larceny therefore all the rules laid down as to simple larceny wide ante to this but it is also accompanied with the aggravation of taking from one's house or person ad Lotte 4 Bl 239 1 Hawk 15.

The evidence must be with force intended to overpower the party & prevent resistance & action before or at the time of taking otherwise no robbery if so if the force is only with intent to get posn. of the property 11 G 2 400

Mixed Larceny

From the house. This the more aggravated than simple is not distinguished from it at C.L. either in its genl. nature or punishment. If find after it is accompanied with breaking it falls under Burglary 1 Hawk 151 4 Bl 239.

Shop lift. It is not distinguishable from larceny, yet in Eng. by Sts. the penal consequence of larceny in a house differs from those of simple larceny in genl. benefit of clergy being taken away from the former in almost all cases. 4 Bl 240 1 Hawk 151 1 Hal 508 Rel 31. Hort 78 Leach 320

From the person. This is either by stealing privately or by violent assault — the latter offence is called robbery. 4 Bl 241 1 Hawk 147.

The offence of privately stealing from the person is a felony at C.L. if above the value of 12 pence capital. Clergy is taken away by Sts. Eliz. If the value be of 12 pence or under it is not capital. 4 Bl 241 1 Hawk 150 1 Hal 529 Leach 233 2 Ille N 399 Hort 73 2 Hal 368

Difference between simple larceny & private stealing from the person is that in the latter case clergy is taken away if of above the value of 12. pence.

Robbery is the felonious taking from another person goods or money of any value by violence or putting in fear. 4 Bl 242 1 Hawk 147

There must be an actual taking an attempt to rob is not felony at C.L. tho, formerly so holden. Tho it is a high misdemeanor incurring fine & imprisonment. 1 Hawk 147 1 Hal 532 3 Inst 69. 4 Bl 242. Stat 7 Geo 2. such offence is made felony & punished with transportation for seven years. 1 Hawk 148 4 Bl 242 Leach 22. 251

If one take goods from another in his presence by violence or putting in fear tho, not literally from his person, it is a taking from the person within the definition — 4. That putting in fear & then driving his cattle away in his presence. 1 Hawk 148 1 Hal 533 Kel. 613 Hawk 104 Coutts 116 4 Bl 242. 2 Ille 844

So if having put me in fear he take goods from my servant in my presence it is a taking from my person & possession 1 Hawk 148

A. was decoyed into a house & detained there till he consented & compelled to write an order for the payment of money & delivery of goods held not to be an assault with intent to rob 25 L. J. 306 523

Robbery

He who receives my money from my delivery while I am under terror from his assault is guilty of a forcible taking from my person. So if by putting me in fear he extorts an oath from me that I will deliver it & in pursuance of such oath I actually do it. 1 Hawk 149 § 8 Just 68 2 Hal 156

But a taking which is neither from / against / the person of the owner or in his presence is not within the definition of Robbery 4 Bl 242 Com Dig 478 Hawk 165

If several join to rob & let, but mislead him one of them goes from the rest & without their knowledge out of their sight robs B & then returns to them all are guilty because of the intent to rob & assist each other / 1 Hawk 148 2 Hal P C 596 1 Hal 533. qu. unless they collected for the purpose of robbing any person who might fall in their way

A robbery after the offence is complete does not purge the offence Nichols it is still Robbery for the definition does not require that the goods continue in the robber's possn 4 Bl 242 1 Hawk 149 3 Just 69 Leach 224 1 Hal 533 2 Hale P C 594

By violence or putting in fear. the intention which distinguishes robbery from other larcenies. Taken then unless no robbery 4 Bl 242 1 Hawk 148 n 3 Just 68 Bell 89 2 Hawk 494

Violence in this case denotes more than is implied in the mere act of taking which is violence in judgt of law. The violence must be such as is calculated to put in fear. Just. / Hawk 149 n 4 Bl 243 Hal 128 / But actual violence is not necessary: putting in fear is suffi. 1 Hawk 149 n Leach 203. 5 /

The violence or putting in fear must not be subsequt. to the taking. Ex Consequentiali from the person afterwards. Keeps it by putting in fear it is no robbery because not a taking so by violence? The violence must have been for the purpose of obtaining the money & taken you should not finding one drunk & under pretence of taking Nimble or he hide & drug him along fr. & forcibly take his money it is not robbery. 1 Hawk 148 n 3 2 Roll R 184 1 Hal 533 11. 35. 2 Hale P C 594.

Hand-cuffing a prisoner to extort money from a prisoner & then

To extort money by threatening to accuse one of an unnatural crime whether he be guilty or not is
Robbery 11 C 2453

actually extorting it is robbery. Leach 260 2 Ld N 597

As to putting in fear it is suff. that a man's fear or threatening is made by word or gesture as might naturally create an apprehension of danger. 4 Bl 243 1 Hawk 149 Foster 128 Leach 204

Such threatening as is likely according to common appearance to excite an apprehension of danger to one's character or good reputation is a suff. putting in fear - Q. Threatening to accuse one of an unnatural crime. Solomon in Eng. by all the Judges. 1 Hawk 149 296 542 2 Ld N 598 Foster 129 Leach 199 93

Begging with a drawn sword is robbing. So forcibly extorting money from another under pretence of a sale. 4 Bl 243 1 Hawk 149 1 Hale 533 Leach 204 2 Ld N 597.

Whether compelling a merchant man or any person by violence to sell his goods at their full value is robbery - doub. not, no felonious intent. 1 Hawk 149 4 Bl 243 -

Nicl. Hawk's case Pl. 43 that taking goods under legal process without colour of right & with intent to rob is robbery - impudent Lazy. Langr. Colour is the fear?

"Putting in fear" not necessary in the indictm.t "By violence" is suff. 4 Bl 243 1 Hawk 149 n. Pl. 90 Leach 204

When the offence is laid to have been committed by putting in fear it is not necessary to prove actual fear such circumstances of violence as are calculated to excite it is suff. Ex. One knocks another down without warning him & strips him while senseless - this is robbery tho. there is no fear. 4 Bl 243 1 Hawk 149 1 Hale 532 Foster 128 Leach 204 2 Ld N 598

A claim of property in the goods without any colour of right is no excuse 1 Hawk 149 1 Hale 504

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Robbery

whether openly taking goods from the person ~~another~~ without violence or putting in fear is felony of any kind and held Hawk 140 that it is not. C.L. snatching a hat from a person's hand & running away with it Hay 275 Dy 224 / It does not strictly fall under either of the divisions of larceny from the person 2 Roll 154 Bac 43. 70 1 Hid 254 Leach 254

An indictment for robbery on the highway is not supported by evidence of robbery in a house. Leach 53 2 Hawk 495 2 Ale N 519

Burglary. This is a capital offence whatever the value of the goods remain & damage is now taken away by St. 23 & 24 & 13 & 14 Vict. & St. therefore draft both in principal & accessories before the fact 1 Hawk 449 & 4 Bl 243.

In Ct. like Burglary Navigate not exceeding 3 years & / Entra made Lewis if a female - Com. Crot 2 - If with personal abuse / force or violence or so assumed 2 Navigate for life for the first offence St Ct. 297. 298. 299 § 22. / What kind of robbery is meant in the first case?

Forgery at the common law at C.L. is the fraudulently making or altering any writing to the prejudice of another right 4 Bl 247 1 Hawk 333 2 Hon 2 Bac 8 C

Bonds & other authentic writings of a public nature deeds Lease. Wills are subject of forgery at C.L. - No decision at C.L. on to wills But it is now forgery by 24 Geo 2. 2 St Ct 298 1 Hawk 210 335. 338 2 Bac 18 1 Ra 75. 76 3 Mod. 66 Str 69 Ray 81 Mor 76

But according to many opinions the making or altering any private writing of a nature inferior to deeds & wills is not forgery at C.L. - Ct. Notes & orders No. 2 according to some there is no punishment in

fraudulently making an instrument in these words - these
monthly forms date I promise to pay A.B or leave
these dollars in shoemaking - signed C.D" is not
an indictable offence at C.L. no consideration being
expressed - nor none existing which could be averred
to forging any instrument which appears on the face
of the indictment to be void if genuine is not an
indictable offence 9 Conn 779 5 Pr 482 3 Caines
287 vid 2 Pd R 1461 Roy & Wauk - 1 Wood 198.

Drawer of a Bill signed A.J.W. when his name was
J.W.A. held no forgery unless the omission of the
surname was done for the purpose of fraud
29 L 414 2 East P.C. 918.

Forgery

these cases, not even for a cheat 1 Ld and 885 2 Ba 588 1 Roll
66 1 Sid 166 155 1 151 Cro E 853 3 Bulst 265.

But since the time of Geo. it has been holden that the making fe
of any writing by which another may be prejudiced is forgery at C L
Ld 1461 Hea 747. Saunders 10 Ld R 901

So fraudulently making a bill of exchange on unstamped paper is
forgery 2 Str 706 East 246 2 Mo N 480 2 Hea 901

By a variety of Eng. Sts. almost every species of writing is made the subject
of forgery 4 Bl 247 1 Leach 330 –

One St. 208 includes all private writings, by the words "any other writing"
so qu as to the effect of these words see 2 Ld 18

If one employed to write a will for a sick person fraudulently inserts
legacies not directed to be inserted it is forgery – Here the name is not
forged, nor the writing altered after being executed. 1 Hawk 336
2 Bastly Moor 587 Noy 101 3 Inst 170 Dy 288 Contra.

Suppose the will never executed – not forgery Sanders for there would
be no complete instrument 2 Ba 5 by Moor 580 1 Leach 337

So writing an obligation Relevant over the name of another found
at the bottom of a letter – Here the name is not forged – So making
a mark in the name of another may be forgery 1 Hawk 336
3 Inst 169 2 Bastly Leach 61

If one make a forged will in the name of another the forgery

Where an order for the delivery of articles was accepted & said others returned to the chemist who afterwards with a fraudulent intent altered the date & wrote produce not to be charged at L.L. for other tobacco & it was no legal instrument. It purported to be drawn by the Defts & was do drawn. It purported to be dated as altered & was so dated & its alteration had no tendency to aid in the fraud intended. I should doubt

is complete tho the sum forged be a trifle. Leach 113 Sol 2 Mod 483

So if one insert in an indictment the name of one against whom it was not found 1 Hawk 33b 3 Mod 66 2 Bac Abr 192 & 12 c. 4, 3. 4, 6

Fraudulently altering a deed in a material point is forgery. Cy. Manor R for manor B. 1 Hawk 33b 2 Bac Abr, Mor 169 11 Co 27 Contra 3 Inst because not made in the name of another than the true signer & neither hand or seal counterfeited. But it is directly within the definition. Semble if the fact is immaterial.

If one having found a bill of exchange writes an endorsement to get it acknowledged it is forgery 1 Hawk 210 n Co R 1461 So one may be guilty of forgery by making & executing a deed himself in his own name. Cy One grants to A & his heirs & afterwards grants the same to B antedating the deed - this is fraudulent & prejudicial to B. 1 Hawk 336 Mor 155, 159 Noy 101 2 Bac Abr 6 Contra Cy 288

But he who writes an instrument in another name & seals it for the latter in his presence is not guilty of forgery - it is in law the act of the latter 1 Hawk 337

The making of must be fraudulent. Hence if obligee changes the words found into tenement it is no forgery. Misdemeanor 1 Hawk 337 Noy 99 Mor 1335 Sal 375 2 Bac Abr 2 Mod 63 But the security is advanced by it 1 Roll 99 1 Hawk 337 Cro. 224 11 Co 26. Yet it is said if this alteration is made with a view of advantage to himself or prejudice to a third person it would be forgery Cy. Obligee might be bound to assign the obligation to a bona fide creditor of his own 1 Hawk 337 2 Bac Abr 507.

Regularly a non feasance cannot amount to a forgery tho the

Coal being consigned to one P. of N.Y. was claimed by another of the same name residing in the same place but who was not the true consignee & he knowing this obtained money by indorsing the permit with his own proper name - Held to be forgery & not merely obtaining goods by false pretences 6 Cowen 72. 4 Ch. 38

In an indictment for a forged note if it be lost it is suff. to set forth its substance - Suff. if indictment do not set forth that it purported to be signed by the person whose name was forged if it set forth the purport of the note giving the name of the maker as a part of the description 16 Mass 56 2 Cowen 632.

intent be fraudulent. Eg. omitting a legacy in a will. But it is seen if the omission of one bequest materially alters the limitation of another it may be forgery. as omitting an estate for life to one whereby the devise of an ulterior remainder to another is made to take effect in possession for here the omission operates in favor of the latter as a positive devise for the life of the former. 1 East 339 Mm. & Sy. 111

Not necessary that any one should be actually prejudiced - suff. if from the nature of the act some one might be prejudiced. Eg. Blake & Stevens 1 Leach 269 - suff. to aver a genl. intent to defraud without pointing out the particular person. 2 Lev 141 Stra 481 Bernard 10 B & C 37 Leach 186

Not necessary to forge or that the writing be published; it is sufficient that the party keep it in his possn. 2 Leach 83 182 216 / Forging the name of a fictitious person may be forgery 2 Leach 83. 182 216 / 2 Lev 141. Stra 481 2 Lev 87 2 East P.C. 951.

If there is an alteration in a part immaterial made by the obligee it is regularly in avoid to himself only if by a stranger or obligee it is of no effect - but if by the obligee it might in some cases be suff. prejudicial to another & if the intent was fraudulent makes it a forgery?

The least variance between the writing declared on & that offered in evidence is fatal. 2 Leach 389

On a prosecution for forging a writing purporting to be such a instrument & ofd. cannot be admitted if it appear on the face of it to be a diff. instrument. Dong 287 2 East 180 n 1 East 209

In the indictment the forged instrument must be set out in words & figures 1 East 180 n 2 Leach 146.

If in an indictment for forgery in the same count two distinct offences, requiring distinct & diff.t punishm.ts are set forth judg.t will be arrested 9 March 1793.

For charging forgery or felonious alteration of a mortgage with intent to defraud mortgagee, it must be averred that there are such bonds, as are described in the instrument & that mortgagee had an interest in them 9 March 1793.

Forgery.

Punishmt. at C L was fine & imprisonmt. & pillory. By a variety of Eng. Sts. death in most cases. 1 Bl 247. 50 East 116

By St. Ca. 297. Negotiate for the first offence not exceeding 3 years & to forg double damages to the party injured & incapacitated to give verdict or evidence in any cause.

The person in whose name the forged instrumt. is counterfeited may sue for the forgery against the prisoner – & of his executors – this rule accumulatory 2 East PC 997 4 & 582 Pea & 9th 116 1 Ille N 37. 60 117 138. 141 149 2 NR 8

On indictmt. for uttering &c. proof that prisoner had uttered other forged is good evidence of his knowledge 1 NR 92. So on an indictmt for forging &c. proof of other forgeries not published is good evidence to show fraudulent intent & Leach. 2 NR 37. 97

Under our St. 298 s1. the making &c of any writing is not forgery unless to prevent equity & justice. This does not seem to bring the offence in a different time from what it was under the C L definition.

The word "alter" is not used in our St. but "altering" is "making a false writing". The form here is to charge with making a false deed &c when the act was altering – "Altering" & publishing as true a forged instrumt. is under our St. punished in the same manner as forgery St. Ca 297 s1. bid Leach 223.

As to the effect of the words "of the nature following" as follows that is to say &c vide 2 East 616 Leach 146 3 Burr Inn. 98. 100 Cowp 229 Ld R 1515 Stra. 231 787 Salkld 280 Doug 93 183. Mott 56

Perjury. is the crime of swearing falsely absolutely & wilfully in a matter material to the issue or point in question under a lawful

Confession alone of the prisoner are not suff.t to convict 15 Howell 147. Some proof aliunde that the crime ch.d has been committed by some one is necessary tho it need not be conclusive 16 Howell 57.

In an indictment for perjury it is never necessary to set forth the proceedings showing the materiality of the question on which the perjury is predicated - sufficient to allege generally that the particular question became a material question 5 Howell 20. 5 Hk 318 2 Ch. C.L 307

To the perjury a forged note to a Sheriff for rent & fence indictable 16 Howell 89 7 Johns 189. 8 Ch Hk

Perjury

oath administered by some judicial proceeding 4 Bl 137 3 Inst 164 1 Hawk 318 3 Ba 814

It must be a willful false swearing with some degree of deliberation & this ought clearly to appear. It is not perjury if the mistake arise or inadvertence. 1 Hawk 319 3 Ba 814 5 Mod 350 10 a 195 Sa 513 3 Inst 164 4 Bl 137 2 Mc & P 35

The oath must be taken in some judicial proceeding - i.e. in some court or before some officer having authority to administer an oath & in some proceeding relative to a civil suit or criminal pur: - immaterial whether the Court be of record or not. 1 Hawk 319 4 Bl 137 Cro E 168 Hob 128 2 Roll 257 Hob. 62 3 Ba 814 ~~#~~ 2 Mc & 470 Leach 53 2 Kun 1189 Cro E 907 185 Hob 610 & 212 5 Mod 348 1 Roll 41 2a 257 12 Co 101

Any voluntary or extrajudicial oath is not within the law as an oath before a magistrate for making a bargain that the property is in him 1 Hawk 320 2 Roll 257 Yelv. 72 3 Inst 166 contra 18 Inst 1367

But perjury may be assigned on an affidavit or deposition tho the affidavit &c is now in any way disposed by the party taking it 7 Ph 315

Perjury is confined to such public matter as affirm or deny some matter of fact. - Not predicable of promissory matter or matter of office the violation of them is a misdemeanor 1 Hawk 320 2 Roll 257 3 Inst 166 3 Ba 814 4 Com 147

But perjury is predicable of any false matter material to the point in question in judicial proceedings tho not affecting the principal issue by disputing the ability of one offered as witness - depends on collateral questions 1 Hawk 320 Cro E 146

Not necessary that the witness be acquainted to shew the perjury true with attending circumstances & to f. Ex Lett. written by persons contradicting his statement on oath 25 6 L 415 2 Rep. 544

Perjury

A party, when allowed his oath in a judicial proceeding may commit perjury as well as an indiff. witness. Bull 239 2 Wh. & 496

In an Ct. of U.S. answer in Chancy. are in Eqy. Parties affidavit in Eqy. upon collateral points in Courts of law - Rich v Watt 2 in Ct. 1 Mass 322 1 Roll 40 Yel 83 Cro E 135 Noy 128 6 Mod 348 2 Lev 52 472 3 Bac 815 4 Com 14. 6.7

If Def. in Chancy. having given a false statement, explains it (upon exceptions taken) in his second answer, consistently with the truth of facts he is not guilty - mistake presumed 1 Ld. 418 2 Rol 5 16. 2 Ill. 8 47

But a Juror who violates his oath in his finding is not guilty for he is not sworn to testify the truth but to decide upon the testimony of others (1 Mass 322) his oath is promissory

Said not to be material whether the fact sworn to be true or not in fact if the witness did not know it to be true - for he is to swear of those facts only which are within his knowledge 1 Mass 322 Palm. 294 2 Roll 77 3 Inst 166 3 Mod 222 Hob 37 4 Com 147

The swearing must be absolute & direct - swearing under some qualification as "I think" or "according to the best of my recollection" &c cannot it is said be perjury (1 Mass 323. 3 Inst 166 3 Bac 815 4 Com 147) qu. If the witness does not think so so fact has the weight of common testimony (Cro Ja 229) May not the law be then modified? It is perjury. Reach 301 2 Bl. 885 Pollo. N 262 263

The swearing must be to a material point - impertinent & collateral testimony cannot be perjury. Ex. Question was C. Compton or not?

The taking of a false oath with a view to impede the administration of justice tho not taken within the State or wholly dependent on usage & practice is punishable as a misdemeanor 8 East 364 9 Pet 256

One before a court of enquiry swore to material facts which called on the Defendt that he flatly contradicted those facts on an indictment for Perjury Held that the testimony before the Court of Enquiry was out of itself suffl evidence that the testimony on the latter trial was false but that there must be other confirmatory evidence that the testimony on the last trial was false or that on the first was true 34 E L 369

witness gives a history of his journey to seek. 2 mings-
rarents some of the incidents of the journey. 1 Ward 323
3 Ba 815 1 Ind. 274 4 Com 147 Not 53 Sat. 504 Cro E 500
1 Roll 78 141 Lab 258.9 5 Mod 345.

But if the false evidence the immaterial point directly applying
to the issue tends to aggravate or extenuate damages it
may be perjury 1 Ward 323 Cro J 212 12 Co 101 2 Sam 198 3 Ba 815
So it is said if the immaterial false point of the evidence is likely
to induce the jury to give a more ready credit to the substantive
point – Case of Sheep with marks – This point is not well settled
Law. 16 258 Palm 382 2 Roll 16 53 b. 8.

Swearing that one ~~[illegible]~~ beat another with a sword when in truth
it was a staff is not sufficiently material to constitute perjury
– the battery only is material 1 Ward 323 4 Com 147 / qu. May not
the kind of instrument tend to aggravate &c

It need not appear in what degree the false evidence was
material – suff. if it be circumstantially so. Must be left to the jury
that it be decisive of the issue fact may be very material
& yet not suff. to govern the finding. 1 Ward 325 n Lo 16 258 889

It is always incumbent on the prosecutor to prove the evidence material 1 Ward 32

The fact of a former trial is good evidence that a former trial was
had; so to introduce evidence of what was sworn. 2 Mod 21 68 635

The cause in which the perjury was committed must be set forth 1 Mod
283 Hay 170

Non-par affir. notes of affidavits &c in which the perjury is assigned
is evidence &c 2 Mo N 21 68

Obtaining goods by false pretences, 14 Mod 554 2 East R 30. 830
3 Camp 370 12 Johns 392 The offence consists in intentionally & fraudulently inducing the owner to part with his property either 1. by a wilful falsehood or by assuming a character Def. does not sustain or by representing himself to be in a situation which he knows he is not in —

The pretence to be within St. must be such as is calculated to mislead men of ordinary prudence & caution 4 Hill 1

Perjury

1361

Not necessary that the false evidence should have been recited by the triers - nor if connecticut any person should have been injured the mine does not consist in damage done to an individual but in abusing public Justice. 1 Haw 325 2 Leon 211 3 a 230 3 Ba 815

The word "willfully" is not necessary in an indictment at C L / Beach 69 / Sems under our St. 348 Sanb.

To commit of perjury two witnesses at least are necessary. Sems there is oath vs. oath. 1 Haw 325 n 10 Mod 195 1 Mo N. 37. 2a 635

How far circumstantial evidence of the fact of Deft. having given evidence is good qu. 2 Mo N 471. 4

Holden in Eng. that the person injured by the perjury could not testify against the offender on a public prosn. / 1 Haw 325 Leak 390 3 Ak 27 308 yd. 6a 4 d. 20 589 11 Burr 2253 / Hea 1043 1104 1 Ak 298 1 Sent 49 C. E 1804 Fairlie v. Beach / Dairin contradictory - Interest in the question 2 Rea 895 116 1 Mo N 6a 105 17 38 41. 4

Two persons cannot be joined in a pros. for perjury the offence not being joint Hea 623 870 921 Burr 246 Barnard 25 Leak 490 Bull 5. 3 Ak 95 Leak 886

Subornation of Perjury is the offence of procuring another to commit perjury. but the perjury must be actually committed Sems no subornation. 1 Haw 325 4 Bl 137 1 Roll 476 67 79 / ch. 72 2 Mod 122 Cro 858 2 Mo N 637

Perjury & Subornation now variously punished at C L. anciently

If an indictment allege the offence to have been committed on the person or property of one unknown to the jurors when such person was known to them an acquittal will be directed
25 C L. 328 4 Camp 364

A false representation tending merely to induce one to pay a debt he owes is not within the St. against obtaining property by false pretences the property must be thereby obtained 3 Hill 169 on this subject see 4 Wend 182 11 do 18 & 57 14 do 546 13 do 87 311 17 do 351 540 25 do 344 1 Hill 315

with death - afterwards with banishmt. or cutting out the ~~tonge~~ tongue - then forfeiture of goods & imprisonmt. & disability to give evidence - other punishmts. were superadded by 5 Eliz & 2a Geo. 2 St 138 & Inst 163.

Inciting one to commit perjury it not being actually committed is at C.L punished by fine & infamous corporal punishmt 1 Mass 323

It is at C.L a consequence of a conviction of perjury that the offender can never be a Jur. 1 Mc N 237 4 St 265

Is a crime in the incident of the omission or alteration of a letter unless it make another word is not material. Ex "Kinda tood" for "understood" (Cous. 229) So omission of "air" for "heir" where assigned in an affidavit 2 Mc 237 Sat 660 2 Mass 239 Dodg 184 n Hra 787 Leach 137 4b 2 Mc N 511 13

By our St 200.548 both perjury & subornation are punished by forfeiture of $57. & imprisonmt. in Newgate 6 months if a male - In Common Goal or Workhouse if a female disqualified to take an oath in any Court of ~~Justice~~ Revenue quere whether the C.L perjury is not intended? In case of disability to pay the forfeiture to be set in the pillory one hour with both ears nailed -

But perjury in a Court not of Revenue is punishable at C.L by fine, imprisonmt. & inability to give evidence

False affirmation by Quakers in Ct. is punished as perjury is St 548

By St. 295 if one "wilfully & falsely & corrupt

If A. in Alb. counsels & abets B. to bring into this State four persons contrary to H. . he may be sued here for the penalty tho he did not himself come into the State. S.C. Feby 1819 Barkdale & Parsons.

If a conspiracy be entered into in one county & the conspirators go into another county to complete their design they may be prosecuted in the latter county without proof of an express concurrence of the conspiracy 4 Hawk 230

The fact of conspiring need not be proved if parties concur in doing the act tho personally unacquainted with each other it is a conspiracy 4 Hawk 230 2 Day 205 2 Esp 79.

to take away any man's life he shall be put to death

No action will lie for suborning or intrap to commit perjury in a former action whereby a Judgt. was obtained against ~~a person~~ the present Pff contrary to the truth & Justice of the case Croke 220 Croke 166 Reily & Owen 158 Croke 920 Croke 601 3 John R 57. 2 Day 454 ange 456

Criminal jurisdiction of our Courts

The Superior Court has jurisdiction of all offences punished with death loss of limb / qu. to these any such punishmt. here or cutting? / or banishmt. of a battery exclusive jurisdictn. — So of crime — not strictly criminal Ib / So also of all crimes punishable by imprisonmt. in Newgate except horse stealing of which it hath concurrent jurisdiction with the Court of C. Pleas Ib.

So also of riots its jurisdiction is concurrent with that of C. Pleas So also of high crimes & misdemeanors — But of Blasphemy / whipping pillory binding to good behaviour / Cetherin Decision Polytheism & Antitrinitarianism it has exclusive jurisdiction 1 Swift 95 Ib.

Of crimes inferior to the above fine — to those punished with death & Newgate / but beyond the jurisdiction of a Justice do the County Courts have in gen.l exclusive jurisdictn. — Exceptions sequa in case of riot &c — 1 Sev 101 Ib.

No appeal from C.P. in criminal cases or quitam fecum. 1 Bu 96 Reily 289 contra 1 Ch. R 391

To make an offence indictable at C.L. it must be public in its nature 3 Bl. C. 104 per Bull J. 1 Mees & W. 2 Burr 1125

An attempt to commit a misdemeanour is an indictable offence 25 L.J. 3 Ch. 441 Q. "did attempt to assault" or "did by soliciting & inducing her" is a bad allegation of the offence 2 East 5 4 Mill 134

Justices have cognizance of all crimes the punishmt. of which does not exceed 7 yr. except theft over $10 - So of theft if the value of the goods do not exceed $10. H 142 113.14.

Of breaches of the peace Justices have cognizance unless aggravated & in which case the offender is bound over to C.P. as meriting a higher fine than Justices can inflict in this case he has no jurisdictn to punish but may bind over or commit pending 2 as Court of enquiry they act in all criminal cases within their jurisdictn H. 336. 142 2 Str. 1096

No appeal lies in all criminal cases from the jurisdiction of a Justice to the C.P. except alone in cases of fine & imprisonment & bail & breaching &c see the H. 142 285 370 158. 97

In criminal cases the Jurisdiction of a Justice is not confined to the town in which he lives - he may hold pleas in other towns in the County in which he lives 2 Rol 357

Here as well as in Eng. offences are tried only in that county in which they were committed - he have no H. on the subject Kilb 401 8 Mod 328 Doug 750 Ld 1 77 2 Mod 503 651

This rule holds in Ec. only as to criminal fenc. - not to quiet tem actions Kilb 401

Bail in Criminal cases

When one is arrested for a crime & brought before a magistrate on charge of a crime not cognizable by him he is to enquire

If an additional punishment is to be inflicted on conviction of 2d offence & the indictment for the 2d offence states a former conviction which is found by the verdict the additional punishment ought to be on judgment of law will be deemed to be embraced in the sentence then awarded & that no information will afterwd lie to awarded the additional punishment WPsh.

28

into the facts charg^d to discover whether he ought to be tried to trial or not 4 Bl 296 2 Sw. 389 St.

But at C.L he has no right to examine the prisoner & therefore none here as we have no St. authorising it — the in Eng there is 2 & 3. Ph. ch.

Upon the enquiry it appear that the offence charg^d has not been committed or that the charge is wholly groundless he is to be discharged 4 Bl 296 2 Sw 389 / Seems he must be committed to prison for trial or if the offence be bailable give bail for his appearance (4 Bl 296. for definition of bail) 2 Sw 390 St.

Regularly all offences below felony whether at C. L. or by St. ought to be bailable — unless particular by St. 4 Bl 297 2 Hal 127

At CL /4 Bl 298/ all felonies are bailable — according to others all offences except Homicide. So that the antients was admitted to bail in almost every case 2 Inst. 189 1 Com 468 1 Hal 97 1 Ba 220

But by 3. Ed 1. bail is confined in treason & further provision are made on the subject by 23 H 6 a 1. 2 Ph. ch. 4 Bl 298

But the St. taking away the power of bailing in certain cases do not extend to Court of K. B. in Eng^d. — Their court or any one of the Judges in vacation may bail for every crime. Kel. 90 4 Bl 299 1 Ba. 219. 23 2 Inst 189 Sal. 105 Stra 5. 911 2 Hawk 76 Comp. 333 Burr 2179.

In case of felony where two or more distinct offences are contained in the same indictment the court in its discretion may quash the indictment or compel the prosecutor to elect upon which charge he will proceed - but if the offences are of the same nature & upon which a similar or same judgt - may be given it seems no objection Bacon 6 22 Km & if the counts are inserted in good faith to meet a single charge the court will not compel an election 4 Bland 211 a in misdemeanors he may join they as many as he pleases -

But this Court will not admit to bail in those cases in which bail is taken away by St. unless under special circumstances or the prosecutor has delayed the trial an unusual time - when the evidence appears very weak or when the life of the prisoner is in danger or sickness 1 22 1 Raym 157. 75 5 Mod. 454 Palm. 558 1 Sid. 78 10 Mod 384 Stra 643 Holt 85. / But in cases of illness it must be occasioned by confinement 1 Bac 223 224 Cowp 333

After recent exp. Def. he is not admitted to bail before trial unless the prosecutor consents - this rule has often been dispensed with 1 Burr 159 1 Black 59.

In St. all crimes are bailable except capital & are taught in open Court 2 Inst 391 St 22. 420

Our Superior Ct. is supposed to have the same power as the B. Ct in Eng. & this is expressly allowed by our St. in treason St 420

Genl. rule at C.L. that he who is judge of the offence may bail the offender 2 H. Pl 420. 5 2 Raym 92. 148

The officer who arrests the prisoner in St cannot take bail in criminal cases. This is done by the magistrate who acts as a Court of enquiry - After commitment for want of bail the Sheriff may take such as prescribed by the Court of enquiry p. 2 Day 1.

Bail is taken to the treasurer of the State County or

If two or more are indicted for jointly making a corrupt contract one alone may be convicted but if the corrupt contract be stated to be joint it must be so proved 1 Ld 318

The mere of conspiracy to do an unlawful act is perfect when the agreement to do the act is concluded - no overt act is necessary 4 Mend 264 3 Ch. C.L 309 2 Ld R 1167 1 Sal 174

On an indictment for cheating the false pretences by which the cheat was to be effected must be set forth 2 Ld R 586 2 East C.L 837 9 Conn 488 need not set forth all but only such as are relied on & these must be negatived 3 Ch. C.L 762 949. 2 Salk 165. 311. 2 Ellenbor 379. 2 Comp 138 9 Mend 191

The obtaining the indorsement of a third person by false pretences & with a fraudulent intent & which has actually been used for such persons benefit is within the words "other valuable thing" 24 C.L 276 p 115. 9 Mend 182

tour according to the court in which the offence is tried

If the magistrate take insufficient bail & the prisoner has does not appear the magistrate is liable 4 Bl 297 1 Ba 227 2 Haw 142

In Eng. four sureties are generally required in felonies — two in inferior offences 2 Haw 141 n 1 Com 473 2 Hal 125 10 Co 101 / Not more than two here in any case land.

Refusing bail where it ought to be granted is a misdemeanor & punishable by fine & imprisonment at C L. the party injured has also his action 1 Com 478 2 Haw 143 1 Ba 100 228 6 Mod 179

Granting it when not grantable is punished at C L as a neglect. enforced by fine 2 Haw 142 206 1 Hal 596 1 Com 473 4 Inst 179

In tt. / Root 90 / on a pris.r for perjury D of t. being out after trial on bail the recognizance cannot be received in court 1 Mc N 39 4 Bl 375 1 Ba 185 / qu. has not the prosecutor been diff.

If a prisoner if prosecuted for a given offence & is acquitted of that but on trial proves guilty of another the Court may not detain him to be prosecuted for the latter Leach 300. 55

Not necessary to furnish for a rule that the rule act be read the reading being necessary only to justify the proceedings prescribed by the statute to suppress the rule
256. L 296.

"If one by false pretence shall obtain the signature" the mere fact that the instrument was signed is not enough a delivery must be shown 4 Hill 127

In a criminal case the prosecutor cannot introduce evidence of what a witness who is absent from the State testified on a former trial 6 Hill 295 - Defense witness is dead - then he can't 5 Randolph 707 - contra 12 Maine 44 rule 2 Ev. Poth 229 1 Greenl. Ev. Ot. 229 -

Costs

By our St. a person charged with a crime for any crime the acquittal pays the cost if the prosn. was occasioned by any unlawful or blameable conduct of his – & thus according to the old law if he be dismissed without any fault of his (suppose) the costs are paid ~~up~~ out of that treasury into which the fine would have gone had he been convicted – In genl. fines inflicted by the S.C go into the State treasury St.

But now by St. (costs arising on public prosn. in the County courts are paid by the State treasury & those recovered go into the same Treasury – costs on trials before single magistrates are still paid out of the town treasury

When costs arise in any criminal proceeding in which there is no acquittal or conviction (as where the prisoner escapes without any fault of the officer before committment) the State pays the cost if the crime was cognizable by the S.C – qu. does the new St. apply to this case.?

If the person charged & tried is liable to pay the costs but is unable he is bound out to service to any inhabitant in this or any of the U.S. but when it cannot be thus obtained it is payable out of the State treasury if tried by the S.C or C.P.

When the evidence before the Court of Enquiry is not suff. to hold prisoner to trial costs cannot be levied against him Kelly 362

In Eng. mounts are found on either side where the crown
possesses except in particular cases — 1 R. 367 Cowl 88

Where a St. subrog. to the St. of Gloucester increases damages to
double or treble where actual damages were given before. Pl.
shall recover costs & they shall be doubled as the St. may
be, but where single or double damages are merely given by
and subrog. St. where no damages in so formally
recoverable Pl. shall recover those or single only &
no costs 2 Inst 289 Gill & P 258. 259 Comp 368

An indictment for a riot is bad unless it conclude in
contravention populi 4 Carrington & P. 378. 588 3 Law Lib. 425

It is not maintenance to purchase an interest which is the subject of a suit even if an indemnity is given against the costs that have been or may be incurred in the prosecution of such suit 8. C. Ch. 640

Adverse poss.n will not effect a trust if it appear that both grantor & adverse claimant have under an equitable obligation to convey to grantee 5 Hill 272. 4 de 469

If one sells land holden adversely by another it is presumed he knew of the adverse poss.n but if he can show that he did not know of such poss.n he is not liable to the penalties of the act 1 Rev. 1437 7 Johns 251 13 de 466. 8 do 227. 2 Caines 183 7 do 182. 8 Pend 632 2 Caines 183

Champerty &c

1869

Maintenance is an officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it. 4 Bl. C. 134. 135 3 Ba 520.

Champerty is merely a species of maintenance for the consideration of having some part of the thing in dispute or some profit out of it they are distinct offences 20 Johns 392. 4 Bl 134 2 Ch. C. 115 1 Ba 360. 20 C. L. 165. 15 Ves 129. Stanton v Bagnell - 18 Ala 126. 2 Dev. & Bat 135

8 Johns 479 that a purchase of land during the pendency of a suit for the recovery of the same land the bona fide is champerty - qu. is a criminal proc. be sustain. in such case - no criminal intent - 1 Ba 361

8 Johns R 327 that if the party aiding for his own interest in the thing in controversy it is not maintenance

If an attorney or counsel take a fee out of for having the plea to maintain the tenant then it be in lieu of

his fee it is champerty

But a party to a suit may receive aid &c. from his next friend either in blood or estate. as a sur &c. from the next of blood in respect of the expectancy of descent from from next friend in estate as they that have expectancies &c. 20 John 396 Hawk Pl Cas 84 p 18 2 Lutt 563 564 B.N.P. 563 4 BR 540

A father may convey to a son pending a suit this is an exception to the gen. rule &c. is not extended to collaterals or connections of collaterals having no relation to the party claiming title 20 John 398 1 Ba 576 3 do 522 523

Both champerty & maintenance are offences at C.L. & punishable by fine & imprisonment 20 John 400

A Brother of the half blood cannot maintain - of the whole blood may 15 Vin 162 Pl 9 - to the limit of a cousin who may be heir may maintain - semble if none die without issue 15 Vin 188 Pl 9

Enough if it can be shown that there is a bare contingency of such an interest in the land in question which possibility may never come in esse 2 Roll 117 1 Hawk P1 Cas 83 p 13.14

Again bona fide purchase of a debt in the ordinary course of business is not unlawful but the purchase of a mere possibility of an action by one having no interest in the controversy & with the express object of commencing a suit thereon for to benefit the dept. or of speculating out of the litigation is illegal & equity will not interfere in pari delicto purchaser 2 Ves. 289 2 Ves & Ster. 244 2 Ves. Jr. 445 6 Dane Abr. 741

A deed of land held assignable at the time is good between the parties 9 Johns 55 & a fee simple upon maintenance or champerty is good between the parties 9 Wend 546 10 do 165.

B. Suppose the C. Co. is in session at the time the Justice renders judgt. Must the appeal be taken to the Court in session or to the next Court afterwards? Appeals must be entered before the Opening of the Court & not afterwards except on payment of cost & not even then if the Jury are discharged 2 H. Ct 189. By Act Mar 1786 p 67. a locating committee are directed to make their report to the next Court so after their service is performed & a return to a Court in session at the time they completed their service holden ill 6 Mar 492 Commonwealth v Gt. Barrington pid 1 Mar 411 Duvall v Mitchell 5 do 435.

A Justice has jurisdn. of an action of covt. on the condn. of a bond the penalty of which does ~~not~~ exceed $35. Where the damages claimed exceed that sum 10 Mend 825

Practice of Connecticut

1371

B

1 Day 418

2 Dall. 74

Vide Esp. 81. 2 Ld Raym. 1380. Salk. 65 1 Peere 158. 159

9 John. 3 Ob that Justice has jurisdiction

A justice may hold cognizance & try a suit qui tam where part of the penalty received would go to the poor of his own town 11 Johns R 76 1 Cow 486

Is a Justice bound to wait after the hour specified in the writ before he proceeds to trial? 20 Johns 309 that he is bound to wait a reasonable time which is one hour he Eng. half an hour 2 Strobh. 278 - That it is more matter of discretion with the Justice whether he waits or not 6 Mand. 632

When a Justice case is adjourned until one O'clock P M of a day certain & the Justice is detained by other official duties until 5 O'clock of the same day, he may then proceed & try the case tho defts. have left the place of trial 10 Mand 103

Port 8

An adjournment of a Justice's court must be regularly made or the case is out of court. An adjournment by agreement of the parties in the absence of the Justice the subsequent entered by him is not suff^t unless the parties afterwards appear if either neglect to appear a judgt is rendered against him It is error 10 Wend 497 – 8 do 569

Off who was a carrier at one time transported goods to £1.4. in a month afterwd. he transported more goods wh. £1.4 held that he might bring separate actions at the same time in the same court for each service & that this was not splitting the cause of action 20 Ed 466 - Lacqu 1 Brent 73. 1 do 65

A. resides in one town B. in another & C. in a third A. & B. join in a suit against C. returnable before a Justice of the town where A. resides Has such Justice jurisdiction? 1 Kent 324 3 Levinz 267. that if two or more persons are concerned as Pltf or Defts — all must be competent to sue in U.S. courts or none — can —

Where a Court has jurisdiction & gives a wrong judgt. appeal lies but where no original jurisdiction — prohibition — 3 & 4 2 Burr 813 1 Burr E.L. 381

If a surety is sued the principal may appeal as he is the party in interest & may prosecute the appeal in surety's name 1 Wend 20 7 Cow 428 6 Johns 158 14 do 501

[illegible]

[illegible] If it appear from the record that neither the matter in controversy nor the amount recovered exceed $70 no appeal lies. If the note is for more than $70 the case is final. [illegible] 1 Ohio 95.

In an action on a note or bond for more than $70 given for money only & executed by two witnesses if one is dead

[illegible]

In an action on arbitration notes for more than $70. if it appear from the record that neither the matter in controversy nor the amount recovered $70 no appeal lies. If the note is for more than $70 the case is final on appeal. 1 Ohio 127 238. 1 Ohio 95.

In an action on a note or bond for more than $70 given for money only & executed by two witnesses if one is dead

a [illegible] no appeal lies to the S.C. 1 Root 5[illegible] 2 3 31[illegible] [illegible] Kirby 387. 1 Sw 93. Ante 2

In an action on a receipt against an officer for not executing a [illegible] exon no appeal [illegible] the [illegible] action is / 1 Sw 101 1 Root 153 St. 101 [illegible] Secus if it is for executing [illegible] exon [illegible] an administrat[illegible] before a Just[illegible] or for not executing an exon [illegible] [illegible] [illegible] for [illegible] St 601

So in an action on a receipt against a receiptsman by an officer for [illegible] property taken in exon & [illegible] to have [illegible] upon attachment St 602 1 Sw 101 Kirby [illegible] So [illegible] on judgt on an acct of [illegible] 1 Sw 97, St [illegible]

If the cause is not affected by the nonappearance of the [illegible] it [illegible] after the cause

No appeal lies from a judgt by default except there was a [illegible] [illegible] not otherwise [illegible] to be [illegible] in that [illegible] he [illegible] in the [illegible] [illegible] 1 Sw 11 Kirby 1. Root 2[illegible]

But [illegible] appeal [illegible] [illegible] [illegible] [illegible] 1 Root 119.

But in a qui tam prosn. on the St for punishing disorders committed in the night season 1st Sir W. Where the damage claimed exceed £40. the Deft is entitled to an appeal. 1 Ld. Ra 391.

No appeal lies from C.C. on a motion for a receiver in a civil action. It is an order of court and not a judgment having the effect of a writ of error. [illegible]

No appeal lies from an order granting a stay of execution. R.C. § 2505.02.

Effect may be taken from a writ in a debtor's action against a judgment in Chief. Bill of Exc. appeals from order for a writ and under part this case in the trial court appeals to and should be a stay against been enforcing on the person debtor's goods, the stay to be in on the merits of the case at the time the C.C. [illegible] R.C. § 2505.02 [illegible] § 54.

[illegible] R.C. § 2505.02 [illegible]

[illegible] R.C. § 2505.02 [illegible]

[illegible] R.C. § 2505.02 [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

$ 1277

[illegible]

[illegible]

[illegible] where an appeal is [illegible] withdrawn [illegible] judgt in the [illegible] after judgt of [illegible] upon appeal from final judgt. take any advantage in the court appellate of his plea in abatement. - Usage

with respect to the jurisdiction of the Supreme & Circuit Courts of U.S. see 2 Root 446 &c

Cause is not removable from our Cs. into the Circuit Cts. of U.S. where the parties Defts. or Pltff belong to State & another State. 2 Root 446 &c.

The State Courts have concurrent jurisdiction with the U.S. Cs in our suits at C.L. where U.S. are Pltffs in the suit 14 Johns 95

State Courts have no jurisdict^n in action lies, for infringement of patent rights 4 Johns 144 2 Vol. U.S.L. 203

Court of Errors

This C. has jurisdiction in all respects final / of all writs of error but for the reversal of any judgt. or decree of the S.C. in matters of law or Eq. where the error complained of is apparent on the record - but has no cognizance of errors in fact. St. 219. 20

Genl. Assembly

Has cognizance by petition of cases of error in which no other Court can grant relief provided the matter in dispute exceeds $25 -

An Action - a suit is the lawful demand of one's right. 3 Bl 116

The first stage of a suit in Eq. is the writ and declaration which is given together - 2 Rev 188. St. 31

The writ. consists of all that precedes the statement of pltfs claim; of the sig nature the certificate of duty paid & the recognizance where there is one the date is common to both writ & declaration. 2 Rev. 188 -

Process

1385

The process contained in our writs is of two kinds — 1 By Summons — 2 Attachment, St 31. 2 Geo 188 —

By process is meant the means of compelling the Defdt to appear in C. in Ct — or of bringing him to trial — In Ct. as the defendt joins with the writ it is not necessary to entitle the Pltff to judgt. that Deft. shall appear / 2 Geo. 188 / Dens in Eqy 17 Ch. b 2 Geo 193. / Reg Pt. 12 Geo 3d common appearance may be entered — i.e. common bail for Deft by Pltff filed — Tidd — 125 —

The process contained in the original writ is called original or mere process in writs accentuated from final or process of exn 3 Bl 279

In Engd there is a process distinct from the original writ / 3 Bl 273 q. 280 / when the writ is a praecipe demi when on dispensed to summon / 3 Bl 274 2 appendix 184 / In Engd a writ agst two & a defendt agst one only is regular in case of tort Bac — 19. 49 —

The writ must be signed by a secretary — by a Justice of the Peace or by the Clerk of the Court to which it is returnable & must describe the C. to which it is & the place of its deposition. 2 Geo 187 St 31 —

A die for against garnishee on a just. rendered by a single magistrate must be signed by him even when returnable to the C. C. St 54. 32 352

It commands the officer or person to whom directed to summon i.e. to give notice to the Deft to appear or to attach his estate or person & have him to appear before the C. C. St 52. 4

It is regularly directed to the Sheriff of the county in which the Deft dwells his deputy or settle-off the constables of the town in which St 32. 352.

Constables have in gen. the same powers in their respective towns as Sheriffs have in their counties St 60 1 Rev 407

A Constable shall summon 2 men in one gen. or shall summon any same person before he is summoned a second time 1 Rev 83.4 1 Mass 625

It may be directed to a Sheriff only or a Constable only — & a writ directed to a Sheriff only may be served by his deputy though named even a special deputy 7 Pick 240 / So in Engl Comp 403 13 Wb 339

Generally the writ can be directed to no other than one of the above officers - By St 1774 no writ may be directed to an indifferent person unless there are two or more Defts. domiciled of diff. counties except where in case of accident Pltff or his agent or Attyd shall make affidavit that he really believes the Pltff is in danger of losing the debt unless &c - affidavit endorsed on the writ -

The indiff. person need not make oath to the truth of his return - Dens of a special Deputy Sheriff 1 Root 284 St 602

That the indiff. person is lord mayor for prosecution does not disqualify him - Do of Sheriff & writ to tales 1 Root 328

The certificate of the magistrate as to the necessity of directing to an indiff. person is conclusive Hulg b. 1 Root 284 2 Dev 188 -

Walden case by SC that a direction to a Sh. or an indiff. person was ill but that a direction or a Sh. and an indiff. would be good / 1 Root 285 / Qu as to the last branch -

If the return of a writ directed to an indiff. person not found upon the time to another - the writ will abate / 2 Root 360 / The necessity might exist at one time & not at another -

A suit against a town may be limited to an inhabitant of the town - or an indiff. person - 2 Dev 188 -

A writ directed to a minor or an indiff. person is irregular 2 Root 519

A constable having legal service within the limits of his own town may go into another town to complete it - Ep. Tolman v. Copy - Blake v. Ramsay C.C. - Sept 1 Root 467

A writ sgd. or dep. of the town of B may be directed to a Constable of the town of B & if he make service in the town of B it is good Dem. writ - 1 Root 407 -

All writs or attachments issued by the Justices their deputies or constables except in their own suits shall state the Bal

A Justice cannot issue a writ for or upon the Justice's accounts for the Justice under his authority but one Deputy may issue. A person cannot for or upon a warrant to the Justice may serve for or upon his Deputy. Beach v. Phelps C.C. Sept. 1803

Writs must be signed by a magistrate or a Justice or clerk of the C. & C. Order 15 -

A Justice may issue original civil process throughout his own County & also into any adjoining County if returnable into his own County — Dewindot — So of subpoenas in civil cases — St. 173 — Contra 2 Dev 187. not law —

He may issue criminal process to bring a delinquent before the justice of peace of any in civil cases throughout the State — So he may issue a summons or capias for witnesses in the first case thro the State — Philly 182. St. 423.4

A Justice may issue a writ in form of the term in which he lives & of course of Court, if organized — 2 Dev 187 Wrant 170 —

Clerks of the C.& I.C. can sign writs returnable to their respective Courts but no other Dev 100 — St. 31

According to usage writs of error must be signed by Judge of the C. to which returnable not be issued without probable foundation of error 2 Dev. 277 —

Formerly the Clerks of I.C. could issue mesne process returnable to the I.C. into any part of the State — qu. now since there is a Clerk in each County

But Clerks of both C.& I.C. may clearly issue

process returnable to their respective Courts throughout the State & their respective counties - & so out they may issue criminal process returnable to their respective Co to any point of the State - in - in time time under the order of the C.

Formerly Judges of the C.C. & Inf. Court quorum could not issue original civil process out of their respective Counties - but now they may issue process in all civil cases to be served in any part of the State whether returnable to their own or any other Court Hc. 499. 422 &c

The Gen - Lieut - Gov Judges of the SC apts & Judges of C.C. can in all civil cases issue same process that will run thro the State - Hc. 492.12

The writ describes the place in which Pff & Deft dwell & there is ordinary case are the only necessary additions / 2 Ld 187 - Hc / but where the office or civil character of Deft or Pff is the judgment to the action it must be added. Ep. Ed &c Hep &c

In all writs in civil cases there must be paid a duty at the time of their issuing - Hc returnable before a single magistrate 499 /. C.C. 8. 34. S.C. 81. C.C.

If the person is sick & the ct. takes any steps by which he is regularly in Court for giving special bail, he can be arrested himself, if the ct. finds in the bounds of Lower 366 17 Johns 63. Ibid 155 1 H. 31 222 1 Bos 350 8 East 255

Process.

§2. on petitions of an adversary nature to the Gen. Assembly
§2. H. tit. Duties, 242

Payment of the duty must be certified on the writ in words at full length by the recording officer signing. Items rated & the same may be drawn from the docket without a fee. 1 Root 505 4 5 H. 243

The writ cannot be amended by inserting the certificate even tho the Pff offer to pay the duty in C.

The writ once filed up against one person cannot be converted into a writ against another nor after time is a further certificate of the payment of a second duty. if it is the C. may ex officio set it aside cost for Dft. H. 243. 4.

The same abilities are payable on quitam actions, actions on public prosecutions & by informing officers &c 2 Root 426

Decided in H.C. that Pff may take advantage of the want of a certificate of duty paid by way of error after judgt for Dft. Oct. 1804 H.C.

1792

Pracs

On any writ of attachment, Pff must give suff. security "to prosecute his action to effect" & to answer all damages in case he make not his plea good — The security is to be taken to the adverse party on all bonds for prosecution one. 1 Root 453 Ch. 38. 9 32. Kirby 378 —

This security is called a bond for prosecution & is given by way of recognizance acknowledged before the magistrate signing the writ & at the time of its signing — Ch 32 2 1 Root 453 —

In Engl security may be required of foreign Pff. not residing there but of no other 1 Bac 96. 2 Ch 383 —

Qu — Is the recognizance intended as a security for the property attached or for any damage occasioned by the attachment; or for costs only? not decided 2 Chitty — Holden security for costs only — post / for costs it certainly is a security

But it has been decided that Pff recog. is suff. if he is of ability to pay costs 1 C. T. C. Aug. 98 & the common practice is to receive his recog. — This decision was founded on practice & the Court held that the recog. was a security for costs only — Root 166 —

Process

If however the object of the bond is to secure costs this practice is useless - for the object is to furnish a security for the property attached the provision of the St. is defeated - for Pltff is liable for costs without it - the former (Sent.) was the object of the St. see qu -

If however Pltff security is insufft. a new bond may be endorsed on motion to the St. to which the writ is returnable - Rust 466 -

Lately decided that a bond for prosecution on a blank writ was not good & that the writ must abate because it could not be taken to the adverse party 16. N.H. 6

According to usage bond for prosecution must be taken on all quitam prosecutions by forthwith process - for Defts. body is attached or arrested - seem where a qui tam civil action is brought by process of summons there the rule is the same as in other cases of summons

Bond for prosn. must be given by some substantial inhabitant of this State" "in every case in which a writ issues in favor of one who is not an inhabitant of this State even tho the process is by summons - H. 312.

Pl may amend his writ by striking out one of the Defts (Root &) part

Need it appear on the proceed that a bond was taken? said Wheaton 304 that it need not appear that the Judge signing a writ of error took a bond upon issuing the citation as required by the 22 s of the Judiciary act that provision being merely directory & the presumption is until the contrary is shown that the Judge did his duty

If the bond is not given in the above cases writ may be altered

To bond for pros. is to be given by some substantial inhabitant & on the issuing of any writ if it appears to the contrary signing that the Pff. has an inhabitant is unable to respond the costs that may be recovered H. 31.2

But in the last case (Dent) the writ cannot be altered in the ℭ to which it is returned for want of bond - for the signature Dent. is conclusive evidence that the fact of Pff's inability to give costs did not appear to the magistrate

But in this case the Pff is on motion by Deft proof of his inability in the ℭ to which the writ is returnable compellable to give bond for pros. with suretys or be nonsuited - so if his inability arises after writ issued - H. Rule

But such motion should be made in a reasonable time if possible - motion after the Jury were impannelled to try the cause decided to be too late - Kirby 344 -

If the security taken is apparently sufficient at the time the magistrate is not responsible in ctr proving insufficient - or if the bondsman fails at time he the Pff. will have is taken - 1 Root 166 168 -

If the Court have no jurisdiction & the party pursue the case to judgt & get out can he then object the want of jurisdiction? 32 C.L. 79

1395

In an unit of Replevin of the security is appurtenant suff. pel resp. he is not liable - except when Pl's own bond is taken in this case if Pl is not eventually liable of ability to pay the magistrate is attachment liable - for this cannot be assessed suff. as it takes the creditor's security away i.e. the property attached & leave him a creditor having had been attached - the St requires security to prosecute &c & to satisfy & answer such damages & demands &c See Root 165 168 5 b 2 b1 St 574 L. 271.

On every unit of error bond with surety must be given that Pl shall prosecute & answer St. 2 b1. / Pl's bond not good -

Every party appealing from the judg. of one court to another must give bond for prosec. with surety - appellants bond not suff. formerly not required on appeals from a Justice - St 278 1 Root 208 -

The appellant & surety are bound that the former "shall prosecute his appeal to effect" &c - Why this is not meant that unless appellant prevail the bond is forfeited but that he if he does not proceed in the appeal for the appeal destroys the judg. R. S 390 -

If appellant does prosecute his appeal & fails the

A party in interest prosecuting a suit in the name of another will on the application of such nominal party be directed by rule of court to pay the costs adjudged in the suit agt. the party on the record

7 Howard 497 – 10 do 622

surety is liable for costs if they are not paid by appellant & for all the costs before & after the appeal 2 Dw 173 - & that bondsman mentioned by Deft. is liable only for the costs subsequent the appeal - qu

But he is liable for costs only & not for them is collectable from appellant? - qu. Is it necessary for appellee to take out ex^n & have it returned nulla est as to appellant's personal property - qu. said 1 Root 215 that noticed is not necessary to subject bondsman of Aff to costs - qu then ex^n will lie on the recognizance or debt bond.

Contra 1 Root 215 that the return of nonest is not necessary to subject bondsman of Aff on appeal - qu.

The proceeding is the same in other cases of bonds to prosecute suits & on nonest as to the principal's personal property - the surety is liable

The imprisonment of the principal on the ex^n will not discharge the bondsmen - for nothing but payment of costs discharges 1 Root 85. b -

The giving of special bail does not exonerate the Defts bondsmen on appeal - Nor does the bondsmen

Process

on appeal when Pff appeals discharge the bondsmen for prosn on the original process

Bondsmen for Pff on appeal is liable for costs if Deft prevails tho Pff die before return of exn - 1 Root 314 / So Semb. & conversely if Deft appeals & dies pending where Pff prevails.

Bonds for prosn not within the St. Limn are to be filed first Basis / St. Ct. 88. 9. 1 Root 563 2 Dev. 175.

Death of Pff before judgt. discharges the bond for prosn 1 Root 259

A judgt in favor of the appellant is final as to the bondsmen on the appeal tho on a new trial judgt be given for the opposite party / 1 Root 461 / So Semb. if the first judgt be reversed by mutt error 1 Root 102 567 2 Dev 175 -

Where returnable

In transitory actions to be tried before the C. or S.C the writ is to be made returnable in that County where the Pff or Deft dwell. 2 Dev 191. R. 394 St. 34

This rule holds in actions against officers at C.L. upon receipt for exn. / 1 Root. 90. St 502

An action for use & occupation is transitory - founded on privity of contract. 2 Caines 374. S.D. 8

Debt on judgt is local. so debt on judgt in C. Pleas must be brot in the county where the judgt was given / 2 Johns C. 381 / so a bill for to revive a judgt 4 Johns R 259 D. 8

Where returnable

But where they are complained of under the St. the indictment be brot. to that Court to which ex^n is returnable / So of original writs / 1 Root 90 St / then it may be in a diff^t county before the J.P. if either party dwell there. Kirby 113.

Where the title of land is concerned the writ must be returned to some court in that county where the land lies 2 Sw 193 St. 34.

Aquitam action may be brot in that county in which Pff or Deft dwells as in com^n civil actions / Kirby 401 Cro. E 645 /

Suits before single magistrates must be prosecuted in the town in which Pff or Deft dwells except where there is no magistrate in either who can lawfully try them in then Pff may sue before a magistrate in one of the towns next adjoining his own. St 32. 4 –

But a writ of error brot to the J.P. must be returnable in that county in which the judg^t complained of was rendered. 1 Root 259 So of petitions for new trials 1 Root 255.

In transitory actions in Eng^d the venue may be changed on motion for reasonable cause of course & merely plea 1 Bos 20 1 Ser 85 Sel 669 7 Mk 53 3 Bl. 294 Stra 874.

In service of process or of notice or pleadings fractions of a day are disregarded even where priority of liens or conflicting claims of creditors are to be ascertained 10 Mass 423

Where days are mentioned in a St. or rule of court they are to be reckoned one inclusive & one exclusive. Ex process shall be served at least 14 days before the first day of the court - the first day of the court is excluded in the computation 10 Mass 424 Vid 5 Mass 137 where service shall be made at least 6 days before the time of appearance.

Time of return

Writs returnable to C.C. must be returned to the Clerks office on or before the day next preceding the first day of the term St 32.

Later returns are allowed if consented to by the parties - So without consent under extraordinary circumstances Ex. An accident befals the officer on his way to the office - or if he be suddenly taken sick before the return. R S 893 -

All writs & petitions returnable to the S.C must be returned to the clerk before the second opening of the court. 1 Root 53 -

Writs returnable to the C or S.C must be made returnable to the term next following the date if there be suff. time intervening (1 Root 315.16) Semble it is true & Semb. rule as in Engd. 3 Burr 341 - 2 T.R. 6

Summons. When the process is a summons service is made by reading the writ in defts. hearing or leaving an attested copy with him or at his usual place of abode 2 Geo 188 1 Root - 497. St - 32.3 -

When Kind & life are sued one copy is suff. (1 Root 475)

If the officer makes service by reading & another serves by reading leaving a copy which is untrue will not abate the writ 1 Root 497.

The suing out of the writ in some cases has been holden to be the commencement of the suit - 17 Johns 65. But the delivery of the writ to the proper officer to serve is the commencement of the suit for any purpose - 17 Johns 65. 12 Ves 181 3 Ves 42 3 Johns Ch 1145 2 R 242 1 Caines 69 3 Ves 133 -

Dept was arrested under a ne exeat after an order for his discharge but before sat at liberty he was arrested on process returnable at Lond - Held that the Chancellor could not order his discharge from the latter arrest but application must be made to the Court where the process was returnable
10 E. E. Ch 98

Summons.

In Mass it not been decided that such authorization by Deft himself does not conclude him?

Decided that petition must be served by copy / 2 Ho 471 / quere to writs of error / 2 Ho 277 / decided by S.C. that writs of error may be served by reading S.C. Laws 1814 S.C.

On petitions for new trial and writs of error if Deft live out of the State service is made by leaving a copy with his Attys here. 2 Ho 189.

If a person residing out of the State is found within it a summons served upon him by reading a copy is suff to hold him to trial Dens. 2 Ho 189

Attachments

are to be regularly served by attaching the property or body of Deft.

See the C.S. relating to arrests and S. 78 to 80

But service by reading a copy is suff to hold Deft to trial - not cause of action, tho the officer may be liable to Pltff. 1 Kent 54 128 5 Ms. 2d 130

The person & estate cannot be bodeen at the same time upon the same attachment
2 Root 346 –

Service of a writ on Sunday is void 1 Comm 209 3 Cart 155 2 Johns 140 –

Where property was attach.d by direction of the creditor & upon completion of service by leaving a copy the body also of the debtor was attach.d without the assent or knowledge of the creditor it was bodeen that the attachment of the property was good against a subsequent attaching creditor. 13 Wells 78.

Attachments.

1401

The officer has no right to take Defts body if he can find personal estate suff. to answer the demand which he knows to belong to Deft. / Sum et C.L. / Lewis if it is not suff. 2 Dev 189 Ld. 58 1 Root 120 S. 211 377

But the officer ought not to be liable to Pl. or Deft. for omitting to take personal estate if he is doubtful to whom it belongs / Humphrey v Rollins C.E. 1803 / Or C.L. the officer in such case may summon a jury to ascertain to whom it belongs & if he does not he takes or omits to take at his peril. 4 Mass R 333 648 2 Mass 428.

And Deft it would seem has no cause of complaint for the taking of his body unless he tendered personal property to the officer. R.S. 400.

Decided by S.C. that the officer having taken the Defts body is bound before commitment to accept personal property if tendered & discharge the body. Sum liable to Deft / R.S. 400 2 Dev 190 / in false imprisonment. So of arrest on fresh pursuit / 1 Root 120 Ld. 58 / Decided contra by C.E. 1 Root 124 but holding that the officer may do it. but he cannot hold both body & property. R.S. 400

Their attaching creditor cannot avail with the consent of the debtor make any disposition of the property attached except as by law fraudulent to the prejudice of subsequent attaching creditors - 16 Mass 294 Rich & al v Ball - Esq. First attaching creditor & the debtor directed the officer to sell the goods before judgt. In Case by subsequent attaching creditor agt officer for not delivering the goods on ~~his~~ exn. held that he was liable but only to the amt that Pltff had been injured & as in that case the goods were insufft. To pay the first creditor the Pltff was subjected to nominal damages only -

Attachment

1402

The Defts land is also liable to be taken by attachment but the officer is not bound to take bond where he can find the body neither is he justified as agt the Pff in so doing unless so directed by Pff — 2 Sw 190 RS 367

32

An arrest of the body may be made by an aff of the officer in his company not an aff; tho he may be out of sight. Esp 504 Bro. 26 Comp 64

If property real or personal be attached the officer must leave with Deft or at his usual place of abode if within this State a true copy of the writ with a description of the property attached. 2 Sw 190 H.50.60

If real estate is attached the officer must also leave a like copy with Deft or one at the Town clerk's office within 7 days next after attaching the estate & before the time of serving the writ have expired. Execution is not had on it against any other creditor or bona fide purchaser Riely 103 H.50

But the omission of this copy will not abate the suit for it is merely intended to give notice to other creditors & purchasers — H.50 1 Sw 189.90 Riely 40.

Personal estate attached is not liable to be sold tho the judgt of either agt the defendant or any other creditor is taken out & levied upon it within 60 days after final

A C^r who has consented that another may levy upon land he has attached cannot afterwards take them away & if he does the agreement the parol may be proved by parol testimony the St. notwithstanding /2 Root 397/ Fraud

Any property which may be taken in ex^n may be taken on attachm^t.
Cs. Bank bills & any tangible property except shares in action & articles exempt by statute 1 Hoadley 153 12 Johns R 220.

Attachment.

judgt. i.e. the lien is lost except where it is under a prior incumbrance & then it must be taken unless exn is taken out & levied within 60 days after the incumbrance is removed. 2 Dw 189. 90. Ft. 60.

33

To the lien on real estate is lost unless exn is taken out & levied upon it & the levy & appraisement are recorded within 4 months except in the case of a prior incumbrance when the proceedings must be completed within 4 months after the incumbrance is removed. 2 Dw 189. 90 Ft 30

If per sonal property suffc to satisfy the exn has been levied on exn the Pff cannot have a new exn nor (semble) sell on judgt. Bee. Cit. Exn D p 355 Sed 323 2 Ellod 214

Scitely decided that offr cannot attach real estate without entering upon it. S & N Hy. C July 1803

If a person is in custody of an offr under a mandat in one cause delivering to the offr an attachmt agt the same person for another cause is a good arrest. 1 Esp 105. 5 Co 89.

When personal chattels are attached the officer regularly takes them into his custody & holds them for the purpose of levying exn upon them - but

If the Off^r attach goods & keep them in an unsafe place so that they are injured he is liable / Q Lathes p 381. D 12. / if this is done by ext^r direction of Deft. being leave his action on the case agt^s either –

If the officer attach property not liable to be attached & deliver the same to a receiptor Sand. the receiptor is not liable for not redelivering 1 Pick. 177 Bro C 230. 1 Salk 590 14 Mass 190 –

If goods are attach^d & left taken in ex^n the debtor dies insolvent can they be sold on ex^n or is the lien dissolved by death? vid 5 Branch 289 that bankruptcy dissolves the lien

Attachmt.

1401

he can retain them no longer than 60 days after final judgt. - within that time ex. must be claimed or the lien is lost - 2 Bl. R. 1218 2 Dec 189 St 60

The off. may deliver the property to a "receiptman" i.e. some individual who gives a receipt for the property & promises to redeliver it to the off. at a time certain or on demand - 1 Rich 40 2 Dec 89 St 603 but he takes the receipt at his own risk & is not obliged to do it in any case - same practice on exps. 1 Root 92 - 33

The receiptman is not bound to deliver the property after the expiration of 60 days from final judgt. & if he promises to deliver on demand he is not liable unless demand be made within 60 days & except in both cases where the goods are under a prior incumbrance - in this case the lien remains till the expiration of 60 days after the incumbrance is removed 2 Dec 190 Rich 40 1 Root 481 -

If then the promise to redeliver on demand & no demand be made within 60 days & the receiptman is bound to deliver the property back to the Deft - & on refusal is liable to him in trover / 1 Root 481

In an action on such receipt it is not necessary for the off. to aver in the declarn. that the judgt. or exn. remain unsatisfied - 1 Root 92

An alteration made in an attachment after it was issued may render it void as an attachment but still it will be valid as a summons 3 Cr R 436

"I arrest you" does not constitute an arrest but if the party submit & go with the officer it does 1 Ld 351 or if the officer touch the party 1 Sel 79

Attachmt

Visible property within the State the belonging to a person out of the State may be attached & the attachment will hold the owner to trial even tho' ff lives out of the State - /1 Root 447/ In this last case must not the foundation be brot in the County where the property is?

So invisible property as debts due to a debtor out of the State may be attached. 2 Day 189 - St 54 n

If visible property belonging to an absent or absconding debtor is not exposed to view service is made by leaving a copy of the attachment with the Clerk - agent factor or trustee in whose possn the property is & this service alone is sufft - unless the absent debtor is an inhabitant of this State or has dwelt in it in which case a copy must be left at his last or usual place of abode in this State Riley 4 1 Root 387 St - 2 Ind Foreign attachment -

Same rule when invis. the property is debts due the absent debtor is attached

But in all cases where Deft is out of the State at the time of the action commenced & does not return before the first day of the term the cause must be continued to the next term & if at the second term it appears probable that he has had no notice of the suit the Court may continue the action to the term next following & no longer - St

Decided 3 Day 353 that when one of two Defts lives out of the State the cause must be continued as this Court provable to overrule with H. Ct 34 p 4. If that yes, will not say things —

It is not necessary that the officer attaching land enter upon or go near it & his return that "he has attached all the right & interest of the debtor in any of the lands in the town of E." is valid as to all lands coming within such description — Any description of the lands in the return which would pass them in a deed is suff.t 11 Pick 346

Attachmt

1406

which time if he does not appear judgt is to be received by defaulte. St. 33 –

But in all such cases exte is stayed till Pltff lodges with the Clerk a bond in double the amt of recovered with one or more sureties to respond to the Deft which he may receive if Pltff succeeding on annulling the judgt by suit to be brot within 12 months after entering of the first judgt – 1 Lev 335. 3 St. 88

If a bond be not lodged the judgt is erroneous. 2 Lev 267 1 Mod 175

Once decided that the judgt was void since denied 1 Lev 335. 3 1 Mod 175 –

The St. provides that real estate taken upon such exte shall not be alienated till after the expiration of the 12 Mo. or after a new trial held on a suit brot within 12 mo. St. 83 –

By St. 64 if action is brot agt a defendant of the State petitioner before a single magistrate & there is no appearance for Deft the action shall be adjourned for a term not less than three mo. & not exceeding 9 mo. & then without special matter alleged the action shall come to trial. St 42

An attachment or levy of ex" on goods does not divest the right of stoppage in transitu 15 Wend 137 3 Bos. 42 1 Camp 282 2 Kent 541 & 51 2 Caines 38 4 Camp 367 15 Johns 186

1207

Attachmt.

If judgt be rendered by the magistrate agt the absent debtor the sci. fa. agt the garnishee is to be signed by the magistrate who rendered the original judgt unless he is removed by death or otherwise before the sci. fa. is sued out in which case it may be signed by another magistrate St 64 2c

And where the demand in sci fa. doesnot exceed $15 - it must be made returnable before the magistrate who rendered the original judgt - or if he be absent or removed out of office before some other magistrate - But if the demand exceed $15 it must be made returnable to the C. C. in the County in which the Pff or Deft is being sued - St 64 2c -

Miscellaneous.

Joint suits lie to S. Con & S. the Devise of Legal Joint In actions on joint securities or contracts if all the Defts are not inhabitants of the State service upon such of them as are is suff to hold them all to trial - in this case the suit is not continued of course but if any of the Defts not of the State are appeared by the sheriff they may be sued by Ordinary process St - 34. ~~Code~~ 2506 n

But if one of the defts out of the State is an inhabitant within it so that service must

Miscellaneous.

demande by leaving a copy at the place of his last usual abode the same must be continued one term at least / Cute / for in this case the St. does not give satisfy Ca. Ca. & if not continued judt. is erroneous S.C. M.C. Riley 4 St 33. 2 St 138.

If Deft. is under the care of a Conservator the latter should be cited to appear but if he is not cited the suit does not abate but time is allowed to cite him Riely 174

The officer may not break the outer door or window of Defts house to arrest his body or take his property. Sees of inner doors / Cook 1. & Co 93 2 Bac 385 Mod. 62 Esp 604. & Riley 383. L 75 / Deft. may be discharged by the C. arrest on sunday void by St. 29 Car 2 Sommons. So by an St. 57. service of any civil process Esp 605 & East 155. L 74.52.

But one house is privileged only for himself his family & his own goods. If only other persons or another goods are in it the outer door or any request may be broken open to arrest them or attach his goods. & Co 93. a Cro E 547.

When a person under an illegal arrest at the suit of one is fairly served with process at the suit of another the latter service is good sans if any collusion. 2 Bl R 823 Esp 605.

1409

Miscellaneous.

When towns, societies, proprietors or other communities are to be served service is made by leaving a copy with the Clerk either of the Selectmen or committee Ch. 188 § 2 if it be made in any other way & recording it it is considered as no notice to the C. with exp. offices dismiss the suit - C.C. Sept. 1816 - in school society N. Hartford

In Eng. a prisoner in Custody of an officer cannot be served with process without leave of C. or one of the judges - 4 Bl. 317. 1 K. Bl. 129 & qu in Ct.

Time of making service.

In suits brot to S or C.C. the time of legal notice in ordinary cases is 12 days i.e. the process must be served the day 12 days inclusive before the day of the Ct sitting - In suits before single magistrates 6 days inclusive 2 Ch. 188. § 32.

But in suits agt towns, societies, proprietors & other communities the brot before single magistrates service must be made 12 days before the day of the Ct sitting 1 Root 109 2 Ch. 189 § - Dit. Corporations

And in suit by foreign attachment before whatever C. return must be served by leaving a copy

Time of making Service

1410

with garnishee / & in the case may be at Dep. least usual place of abode / 14 days at least before the sitting of the Court. Sec 62

In civil suits agt. officers for not returning or for not executing a writ or for making a false return the time of legal notice is 14 days / Sec 601. 2 Jan 189- / Lewis if the suit be at C.L. & Com Pl

This rule holds / Semble / only in cases of complaints under the Sec; & not in ordinary cases & not in the ordinary cases of suits at C.L. & On off. receipts & that the latter are C.L. Suits Hid / 1 Roor 90. 1 St. 600. 1 / qu. whether it does not hold as to suits at C.L. I M informs me that the L.G have considered the provision to extend to all suits agt. offs. for not executing writs & that they may have two days to seek their security -

In all these cases the day on which the writ is served is included in the computation of the time & that on which the C. sits is excluded

If service be made on the last day allowed for service it must be completed before the

Time of making service.

evening twilight is gone & while there is light suff. to enable the offr to read the process — S.C. L.C. contra

Initiatory proceedings but to recover penalties are not within the above rules as to notice they may be brot forthwith process - i.e. a warrant issued on a written complaint made to a magistrate / 1 Burr 43 / Sess Cases if brot in the form of civil actions

In criminal cases after the writ is served returned to Defts - consideration is not within any of the above rules - Suff. that a reasonable notice is given & if in the opinion of the C. the notice is too short the C. in its discretion will continue the cause or postpone the trial

One Deft. cannot take advantage of a defective service upon his Co-Deft. 1 Burr 48.

Bail.

Bail of two kinds 1. Bail to the offr 2 Special bail.

1. When Defts body is arrested under an attachment it is the offr duty to keep him safely that he may be forthcoming in Court unless he offer to the offr suff. bail for his appearance - this is bail to the officer - 2 B 1296 Fiaca 106

If no bail be offered the offr must regularly commit Deft. to prison for safe custody

a Sheriff may admit to bail a prisoner committed on criminal process 2 Dey 13—

Arrest under the name of Stephen T Silk Bail Bond executed in the name of Stephen Thomas Silk held ill 11 6 T 108

1412

3 Mt 290 / But a Deft directed on mesne process cannot be committed in Ct without a mittimus signed by a magistrate - i.e. a precept directed to the gaoler declaring the cause of commitment & requiring him to receive & keep the Deft till released by due order of law. Civil Offr 104 199. 218 St 58

Mittimus is necessary because the writ does not order commitment - after committing the gaoler according to our practice takes bail & releases - 2 R - In the bail bond thus taken & approved as in other cases 3 Mt 290 Field 108 St 189 -

By St 23 Henry 8 ch one St 68 the offr is bound to accept such bail when offered & to discharge the Deft - bonds at C.L.

To bail or to commit to bail a person arrested is to enlarge him to his sureties on their giving security for his appearance 3 Mt 290 & he is supposed to continue in their friendly custody instead of going to gaol

The offr right to arrest the Deft by mesne process is founded on his ultimate right to take it in exn - but as the object is only to secure Deft person to be taken in exn the purpose is answered in contemplation

Is the offr refused to accept bail any thing more than clause of civil process? if not then trespass will not lie –

Bail

of law by putting him in the custody of suff. sureties - a sort of keeper

The security thus given is called a bail bond the obligors are called bail 3 Bl. 290 2 Dw 190

The bail under the St must consist of one or more substantial inhabitants of this State of suff. ability to respond the judgt that may be recovered St 1829 2 Dw 190

The bail bond is conditioned for the appearance of Deft before the Court to which the writ is returnable St. 1828. Civil Pr 2.3.

This bond being given the Deft must immediately be liberated from custody

If the Off refuse to accept suff. bail when tendered he is liable to Deft for false imprisonment if tendered before committment - qu: for false imprisonment case lies 1 Bac 206 2 Wils 303 1 Com 489 5 Co 582

If Deft is committed to prison for want of bail he can be detained on the attachment no longer than 5 days after the rising of the C. in which &c - If then exn is not lodged upon him within the 5 days the goaler must discharge him on payment of the goal fees.

Any undertaking by a party to a Sheriff indemnifying him for not executing process, or detinue are void.
1 Str 419 Cap. Anders. 2 by 16 Co 101 Cro E. 178 Poyle 165
Moor 842 Sacund 161 in 5 Burr 2683

Tho the Sheriff cannot take bond in any other form than as prescribed by the St. yet the party may. 1 B
422 2 Atkins 504. 7 Str 111 by Lawrence J. in 1 Ch. 68 Ken 62

where Deft in exn is dead leaving no Exr of his relation
decline on notice to take out admon the Deft may
be discharged by the C. from which the exn proceed
1 Bos 176 / 2 Co. Ct. Presume

The off may if he pleases release the Deft without
bail & if he disappears or surrenders himself on the
exn the off is safe - But this proceeding is at the peril
of the off for leaving arrested Deft he is bound to have
him for the wording - Sem he is liable for an
escape. 3 Bl 290 Rily 209

But the off himself cannot become bail for
he cannot give a bond to himself - In an
action therefore for an escape a plea by
the off that he gave his own bond for appearance
and that he is responsible is no defence
Rily 209 388 4 Bos 462 5 Co 89 3 Bl 296 Doug
450 a 446 -

Any undertaking otherwise than by bail
bond that a Deft arrested on mesne process
shall appear &c is void by St. 23 Hen 6. 1444
418 Pl 109 239. vid St Ca 68

In Ct. if the off take insufft bail he is liable to
the Pff on nonest returned upon the exn in an
action for an escape - 1 Rast 54 St 689

If offr take insuffr bail thro, more negligence without imputation of any improper motive & thro, ignorance still he is liable 1 White 222 2 Mfs 188.

An inhabitant of the County of Essex in the County of L. in these cases or process returnable in the latter County & bail there given - bailiff is not bound to give his exr to an officer in the County of E. in order to surrender the bail - the bail must have his principal in the County of L. recovery - seems that the officer in L. may return the exr. unexecuted without search if there be no fraud or collusion Grace v Shaw 13 Mass 213 -

Lzog. 210. 78

Lzog. 210 -

1415

Bail.

Seems in Engd there the Sheriff is first called to return the writ & then to bring in the body & if he does not on the latter rule perfect bail alone can attach nit issues agst him to compel him to pay debt & costs 4 Bac 461 Pr 58 20b 3 Bl 291 Lida 187 2 Sw 180

Derived 1 Root 54 that the offr is not liable if he take bail apparently suffict at the time tho they should afterwards fail - Seems in Engd - 3 Bl 291

The bail may at any time on suspicion of the principals intending to escape take his body wherever he may be found & surrender him to the offr - he may take him on Sunday & surrender him afterwards the same original arrest on that day would be void 1 Bl R 753 7 Pr 122 8 - 45b 3 Sch 148 Cro 605

Decided contra 2 Bl R 1273 & that case liberal to a voluntary escape in this particular 1 Bl R 25 But the offr is not bound to accept a surrender before the return of the writ, it is optional with him Seems of bail alone the power surrender at any time & the offr must accept

The bail has no authority to surrender after issue in taking the principal but

An irregularity in the original complaint cannot be taken advantage of by the Bondsman on the sci. fa. 1 Rob. 548 2 Ibid 354

Bail to the officer have no right to take their principal into custody — Same as to Bail above 14 C.L. 355. 1 Ashl. Pi. 311-315

but they have a right to obtain it if they can & the apprehent cannot lawfully be arrested

Decided in 1 Root 107 that an officer having made an arrest, may by an escape warrant retake the prisoner in another State — S. 83. 89 2 Root 56

The bail bond is negotiable Cotta in Ct 1 Root 281 / 2 in Eng. is to the Pff in the action 1 Ba 207 St. 4 Geo. Vide 15 b. 7 & Bl. 290

To that construction on the bond may be not after assignment in the name of the Pff. 4 Ba 462 Vorling is the well decided term 1 C 1798 / but in Ct it is usually bond in the officer's name

If Pff accept an assignment of the bail bond he is to look to discharge the off. 1 Ba 199. Vide 15 b / 1 Wils 223 —

In Ct 1 Root 54 St 68. 9. Ct. 89 / if the bail are insufft the Pff is bound to accept an assignment of in discharge of the off — at least he cannot recover agt the off after refusing to accept it. So if they were apparently sufft at the time but must seek his remedy on the bail bond —

If then the Pff having refused to accept an assignment of the bond sues the off for an escape it is a good plea for the latter that he took

Offr has an his election either to take exn. agt. the body of the Deft on his bail but cannot have both & having taken one he cannot take the other 6 Johns 97 Leo J 320 1 Roll 897 2 Bulst. 68 1 Rent 315 2 Mod 312 2 Leo 195 2 Jones 75 2 Maule & S 111 7 Johns 119 Sidd 1155

The St. of Limn. in a suit agt. the offr for taking insufft. bail begins to run from the return of mesne on the original exn Mather v Green 17 Mass 60 12 do 127 Rice v Homer 9 do 477 Long v Billings 2 do 188 10 do 89

1414

suff. bail or bail apparently suff. or has offered to assign - & then the case turns upon the question of fact whether the bail were suff. 1 Root 50

Qu. Is it necessary for the officer to plead that he offered to assign; or is it the Pff. duty to demand it? The st. provides that no recovery shall be had agt. the officer unless he should have taken insuff. bail or shall refuse to let the Pff have the bail bond which seems to imply that it is the Pff. duty to demand it & that pleading a readiness to assign would be insuff. 0. 82. 39.

If the Off. having recovered judgt. on the bail bond sues a sur. for by liver. it is not barred by Defts. paying the original debt & costs - the exs. may still recover on the sur. for the Offs. fees & disbursements 1 Root 254

A Dft. cannot twice be holden to bail for the same cause of action / Fidler 35 / i.e. while a suit is pending on one arrest Dft. cannot be arrested again for same cause. If he is the C. will discharge him / Fidler 35 / S. 374

Formerly if Pff. were nonsuited in the first suit he could not afterwards arrest Dft. in the same cause. Sims vs. / 2 Will 381 / But even now in Eng. in such an judgt. Dft. cannot be arrested

Where the principal would be entitled to an immediate summeliteral discharge if surrendered the Bail are entitled to relief by entering an exoneration without any surrender 9 Pet 358 14 East 599. 4 John B 407 1 Ba. R 10

if he were arrested in the original action Lucas 56 Ld K 679 Said 37. 2 Th 756

48

Tho the consideration of the bail bond is that the Deft appear at the time & place & yet his non appearance does not of course work a forfeiture of the bond - for by the 8th Eli. Bail p. the bail are made liable only in case of the principal's avoidance & a return of non est inventus upon the exn Raily 382 209 434 2 Sw. 174.

If the Deft be not surrendered in C. it is Pffs duty if he means subject the bail to take out exn & to use due diligence to have his body taken before non est returned; the bail are saved

If however the principal makes avoidance i.e. not surrendered either in C. or on exn & non est is returned; the bail are liable & their liability extends to debt & cost. 1 Ath 39 2 Sw 174 Raily 382 8th Eli Bail -

The return of non est must be made (Semb) both as to the person & personal estate not as to real estate (Semb) for Pff is not obliged to accept real estate in discharge or instead of the body

Rule in Md. that where the principal is imprisoned for debt in another State the bail shall have thirty days to surrender after his principal is dischd. from such foreign imprisonmt. So if the Bail is sued there on his recognizance the court will stay proceedings until such 30 days have applied. 2 Rand 263 pat 1428

Bail.

1419

The proper action to be brot on the bail bond appears to be deduc therefrom the words of the St. it seems sir fac will lie / qu. 1 Root 284 4 Ser 7 / 2 Bur 173.5 Riley 383 2 St 39. Lit Bail -

49

In Eng. the action must be brot in the C. in which the original action was brot - / 8 Mo 152 Pr 365 2 Burr 1923 / Semble in C -

An actual surrender of principal upon ex is not necessary to save the bail for it is the offic's duty holding the ex to make diligent search for him & if by the use of due diligence the off cannot take him the bail are liable - but they are not liable. 2 Bur 174 Riley 382. 4

Holden in a case in which the principal shut himself up in an inner room & by threats prevented the off from taking him there the bail were liable - suff avoidance

The return of non est must be filed made or the bail are not liable - If Pl by his false pretences such a return to be made unnecessarily for the purpose of relieving the bail they are discharged & Bur 174 Riley 383. 4 -

A party bound to appear before a court of criminal jurisdn & answer what shall be objected agst him forfeits his recognizance if he departs without leave. Is it any defence that he was ready to answer if he did not appear when demanded at a subsequt day of the court 10 Mass 431 Marsh B 2. Ch 15 p 84 Bac. Bail in Crim. Cases.

The only use of the clause "that he shall not depart until dischd" is to restrain the party on other charges than those for which he is particularly required to answer & if he is convicted on such other charges & refuses to appear after formal notice the recognizance is forfeited Marsh supra 10 Mass 481

Bail.

1420

Tho it clearly is not necessary for the off in order to subject the bail to delay the return till the expiration of the 30 days for the purpose of finding the principal out that 30 the bail require is that he not fraudulently & secretly —

If the principal die before now it returned the bail are saved — Cutler Bail 1 Sir 175 1 Bac 216

Bail to the off must be discharged by mt. ex. actual surrender of Defts body in C actually his bail or by legally / 1 Bac 218 1 Roll 487 — /

2d By a surrender of his body or being or tender of suff. person & property in the exh before now it returned only his being in a situation in which he might be taken by the use of due diligence / 2 Sir 1073 / only his death at sup —

3d or in the same sport / By Defts forwarding & entering special bail ind 2 Mod 101

4th By Pltff accepting a plea without special bail after mod. in custody 1 Ld

5th By Defts obtaining final judgt. 2 Sir 175. b —

6th Principal's bankruptcy Semb. 1 Bos 448 —

A recognizance to appear in a criminal proceeding which is forfeited & paid does not prevent a further arrest & proceeding for the same offence nor does a discharge from a first arrest by Habeas Corpus prevent a delinquent arrest stated 9 Pet 709 –

Bail.

1423

A mere appearance in C. without a surrender & without pleading does not discharge the bail (Rily 434) Does not a dilatory plea. 2 St. 309 pr 2 Tit bail — 51

If Deft. be surrendered in C. it is necessary for the safety of the bail that the surrender be entered on the record for no other than record evidence is admissible to prove the fact 2 Sw 174 Rily 18 Mod 210 Cro J 402 1 Sen 24 3 Bidd 192 —

On such surrender the Pff must move the C. that Deft be taken into the Sheriff's custody seeing he may go at large & the Pff lose the benefit of the arrest — qu. Is it not the duty of the C. ex. offo to order Deft into custody? 2 St. 309 — It is not the practice

If the principal be in custody for a crime the bail may bring him up by habeas Corpus to surrender him Rily 218 —

When Deft whose body has been attached appears in C. & does not enter special bail the must plead if the Pff require it "in custody of the C" — 2 pl Pff except a plea not containing those words the Defts body is discharged 2 Sw 175 Rily 434 & of course the bail — qu. Does this

If one enter into a recognizance or bail when it is not demanded he is still liable 5 Hand. 287 Ster. Johnston v Larne 2 B.R. 1459 –

52

rule holds if he be surrendered in C.C. the acceptance of the plea is a waiver of Pltff right to hold the body 2 Root 101 –

But if Deft having pleaded "in custody" prevails in the original action he is not obliged on new trial being granted to plead "in custody" again (Bullen & Leake L.C.) of course he is not obliged on the new trial to give special bail – for this is given merely to prevent his being taken into custody – the Deft has answered the law by surrendering himself at the return of the writ & on obtaining judgt – he was of course released according to law.

If Pltff in C.C. accept from a Deft. whose body has been attached a plea not containing the words "in custody" no special bail being given & the Deft prevails Pltff cannot in Eqy. C. require Deft to plead in custody or give special bail – he has waived the right by accepting the plea – 2 Root 101 –

Same rule holds if Pltff had prevailed in C.C. & Deft had appeared for there would be evidence of a waiver – L.C. holds the same rule would obtain on a new trial granted by either party

whoever prevails on the first trial cancel
qua supra -

Appearance is the first act of Deft in C. Rule 122 53
Sec 8. / In Eng - by St. 12 Geo 1. Pltff may enter a
common appearance for Deft Tidd 124. b -

The Deft regularly appears by himself or Attyr
at C.L. / Parties could not in gen appear by Atty
nor by St. Westm 2d they may / Tidd 114 1 Inst. 128 -
131 a 1 Mod. 244. 2 Sid / Exceptions aggregate must
appear by Attyr / Cutts. at supra / -

In S.C. have decided that an Attyr may not ap-
pear for a town / Pltff. / unless appointed by a vote
of the town or by an agent authorized by a vote
of the town to retain an Attyr

A Sheriff cannot appear as Atty. St. 2d Sh. Rev
238

Infant Pltff by guardian or next friend Defts - by guar-
dian Tidd 19 a Ch. 135 R. 264. a

Special bail.

When a Deft who has been
arrested is brought into C. by an offr or surrendered into
C. by his bail or by his own voluntary act on a

Special bail.

when he is discharged out of custody & the bail to the Sh. are of course discharged -

In Eng. this is called "bail above" or "bail to the action" Dicas 156.

And if not surrendered he is not allowed to plead without special bail if Pff. require it. St. 68

Special bail according to our St. 68 must consist of "suff. sureties" but it is common to accept sureties if Pff. do not except the sureties offered the Court decides upon their sufficiency by enquiring of witnesses -

In Ct. special bail is given in open C. only by the sureties entering into a recognizance in a suff. sum that the Deft. shall abide the final judg. - The recognizance is made payable to the Pff. (Rich 12 378)

Decided that the party for whose benefit a recognizance is taken may sue upon it whether he is concerned or not (Rich 378)

In Eng. it may be taken before a Judge or Commissioner out of C. 3 Bl 291

If the recognce is forfeited the special bail are

diligen to satisfy the whole judgt rendered agst their principal

But it is forfeited no otherwise than by the principal's surrender & a return of non est on the exn as in case of bail for appearance

In Engd the bail are discharged if they surrender the principal before the return of the ca sa agst themselves. Sizer 147. 9 Wils 270 2 Bl 1293 2 Str 1167 1 Bac 2 Ab Bos & P.

In Engd actually of the C. cannot be special bail to prevent maintenance & brocage Doug 450 n or 4 Bn / Sem in Ct.

In Engd bail to the action i.e. special bail have have for the purpose of taking their principal a right to go into his house surround as he has himself i.e. Sent. a right to break his doors 2 H Bl 120 pot J

And they may break & enter the house of a stranger in which he resides to seek for him the outer door being open. qu. is it necessary the outer door be open?

Do not the same rules apply to bail for appearance?

Qu. whether special bail recognized in one State can take their principal by virtue of a bail piece in another

L. 211.
Pl. 4b.

The Court of C. B. will allow of no amendment of a Sci. fac. against bail 3 B. & Ros 321.

Decided that they may by S.C. Rep is holden up some years since / 3 Day 485 & Epp. 190 n. also 1 Root 107 decided that an offer bearing made an arrest may by an escape warrant retake his prisoner in another State - 88389 sh

A bail piece is merely an entry or memorandum of the proceedings in letting the Deft to bail. 8 W 291 App. No. 3.

Form S. County Sept term 1816 On a writ of attachment from Caracom in sd County returnable on the - day agst - A.B of &c - at the suit of &c - of a plea of Debt of twenty dollars - The bail are A.G - of &c & C.D of &c
S.S. Atty for Deft - The party himself in £20 each of the bail in £20 - Acknowledged this day of &c before me - O.P. J. Peace &c

Bail may break an entry door to take their principal / Johns Cases 44

If final judgt is rendered agst - Deft the usual is that on principals surrendering & return of non est the special bail are bound (like bail for appearance) to satisfy the whole judgt - costs on damages & costs. &c.

Bail are not liable beyon the extent of their engagem.: which is for the principal sum recovered & costs of the original suit - not for interest on the Judg.t between the signing of judg.t in the Court below & affirmance in the Court above - 2 B & P 57. 78

Cowp. 723 in S. 4 Burr 2127

The usual & most proper action agt. special bail is a sci fa. it being founded on a record. 2 Dw 1357 Reily 378.

The Scut. Debt may be brot; on the sci fa the judgt. rendered agt. the principal is affirmed agt. the bail with no additional costs

But the sci fa. or other process on the recognizance must be served on the bail within 12. Mo after final judgt. Suits agt. bail to the offr are subject to the same limitation 2 Dw 175 2 Root 380.

Decided that the 12. Mo are calendar Mo 2 Root 380 / Genl rule of C.L. contra 2 Bl 141 4 Wh 224

The particular day on which judgt was rendered agt. the principal may be proved otherwise than by record 2 Root 380.1 / for no entry or record is made in our practice of the particular day on which judgt is rendered all judgts being entered as of the first day of the term

If special bail is given in C.C. and an appeal taken the sci fa or other process must be served on the bail within 12 Mos after judgt rendered in C.C. The judgt in C.C in such case not being final within the meaning of the limiting clause of the St. for it

The principal having been convicted & sentenced to State prison for 13. years an exonerator was entered on the bail piece - because the law has taken him out of the power of the Bail - 18 John 335 Carter 148 gn

Ante. 227.

is destroyed by the appeal

In consequence of this limitation ex^n must be taken out agt the principal & non est returned within 12 Mos at furp - & it must be taken in such season as that the return may be duly made - Ex - Not on the day before the year expires

But according to 2 Sw 175 it may be taken out at any time which will admit of due diligence to take the principal. C.E. 1809. Cooke v Collins

Suits on bonds or recognizances for proⁿ are not within this limitⁿ 1 Root 363 5 b3 2 Sw 175 -

A recognⁿ for the proⁿ of an appeal by Deft does not exonerate the special bail - In this case both bondsmen are liable if judgt goes against Deft for costs & that special bail on the return of non est for the debt or damages also

Under our St. 68 Special bail & bail to the offr may on judgt - rendered against them & before satisfaction maintain an action against the ~~Sheriff~~ principal

And if a bond of indemnity is given they may doubtless maintain an action on it as soon

If the creditor agree that the principal shall depart the state & that no proceedings shall be had until his return & he does proceed against the bail he may plead these facts in bar if made without his consent & with his consent proceedings shall be stayed until return of the bail 6 Mass. 286 7 Cowen 274 10 Allen 236 Lent v Paddleford 3 Burr 1673 per Gates.

as they become liable - i.e. on the principal's surrender & return of non est & before suit brot against them - It is no objection to bail that they are indemnified by Deft - or another person / Ex parte Deft. Cliff - in Eng. Hob. 21.

If final judgt be given in favor of Deft the special bail are of course discharged as bail to the sheriff would be if there were special bail. 2 Str 175. 5 ante 27

And an erroneous judgt the reversal by writ of error has the effect of a final judgt - or rather is deemed a final judgt - within this rule - Eg. Judgt in S.C. for Deft - reversed in C.P. - or a judgt in C.P. for Deft. not appealed from but reversed in S.C. on writ of error - / 2. Str 175 1 Rast 102 4 bg. 5 bl / Same in Eng - 2 Str 175 - / ante 27

Tie ex to condemnation for profts on appeal by Deft - 1 Rast 4 bg -

So a judgt in favor of Deft after verdict set aside by granting a new trial is

A Sheriff or attyf. cannot be bail 20 John 129
15 Ch 535 Doug 466 2 Bos 150

Special bail

final within the rule 1 Root 469 2 Str 175 — 1730

Same rule extends to Conds for proc.n generally Semble. / 1 Root 469. Gee —

Every judg.t in chief then rendered for Deft in S.C & every such judg.t so rendered in the C.C or by a single magistrate & not appealed from discharges the bail — Semb.

Special bail are also discharged like bail for appearance / Ante 50.1 a / by surrender of Defts body for Semb. of suff.t period / property / on the exp.n before named returned or by his being in a situation in which he might be taken by due diligence or by death before such return made — 2 Str 175 1 Bac 216 Hutt. 47

Special bail may be charged on motion if the bail have failed or for other reasonable cause — / 1 Root 575 / so of Condemnation for proc.n of actions or appeals — 1 Root 575 —

Defence and Pleading.

The Deft having appeared & where it is necessary having given special bail or been taken into custody is to make his defence which is at. form the next stage of our proceeding.

Defence and Pleading.

In Eng. the first proceeding after bail to the action put in is the filing of the declarn. which may be under certain circumstances done at any time within a year after suing out the writ 2 Bl 292. 5 7 H & B.

By defence is meant a denial of the cause of action - but judgt may be rendered in several ways without defence as well as after defence made. 3 Bl 296

1. Default.

If Deft does not appear at the return of the writ after being three times publicly called in C. he is said to make default of appearance & this default is recorded H. 33.

In C.C. the Docket is called on the first day of the term & if Deft. do not then appear by himself or atty. & answer to his name on being called at Sup. his default is recorded & judgt. entered up agst him unless he appear on or before the second day & move for a trial in which case the Default is erased on his paying the costs to that time. The Pltff cannot therefore take out exn upon a default till the third day of the term

When the parties agree that a default or nonsuit shall be entered according to the decision of the court on a case stated matters of form in the pleadings are waived unless expressly reserved

11 Pick 216

Default.

In S.C. it is not usual to call the docket. Regularly therefore judgt. is not rendered upon default by that C. till the case comes to its turn for trial unless the Pff. move that the case may be called.

62.

By a rule of both Cts. the Pff may at any time take judgt. by default notwithstanding an appearance for Deft. unless Defts. atty. will declare in open C. that in his belief there is a serious defence & unless he does this the C. will order a default to be entered. This is to avoid a delay of justice when there is no defence.

After default made Deft is considered in C for many purposes. Eg. For the purpose of moving to be heard in damages on which motion a hearing is to be held as to the amt. of damages only. Kirby 17. 2 Hill 351 1 Sw Ch 1 Root 5 Hill.

So for the purpose of moving in arrest of judgt. 1 Ld. R 1274.

But after a default Deft. is not in C for the purpose of moving an appeal unless there has been a hearing in damages.

Default.

Our judg^t by default or upon demurrer. 1433
damages are assessed by the C. (in Eng^d by a jury of enquiry Doug 301) & the Def^t may always have 63
a hearing in damages. H. 33.

But of late a jury has been dispensed with in Eng^d in certain cases – as in bills of exchange. Doug 301 8 TR 327 1 H Bl 252.

In Eng^d a default regularly admits nothing more than that Pff is entitled to recover something. 3 TR 302 Lead. 494

On default where the damages are • presumptive & no hearing in damages is moved by Def^t judg^t goes ex^t – lies in Ct. for the whole sum demanded. Under these circumstances the Def^t. by suffering a default admits that he is liable for the amt. demanded – Ex^p cases of tort generally & some cases of contract –

But if a hearing in damages is moved the default admits (sem^b) nothing more than that Pff has cause of action & he must prove to what amount he has sustained damage – so that the default per se admits nothing more than Pff's right to recover something as in Eng^d tho' if no

In an action on a joint contract agt two where one has suffered a default & the other obtains a verdict judgt must be arrested. vide the first Sh 143 n.a 1 Stra 610 n 1 Sell. Pr. 358 & rendered for both 3 Day 307. Secus in case of torts unless the ben or justification of one of defendants be a bar of action agts all 2 Sd. R. 1372. S.6. 1 Stra 610 3 Day 272 Sh 143 n.a

Default.

motion be made for a hearing in damages judgt goes for the whole demand et. 5 BR 302 Dong 303

1434

64

Where the damages are ascertained by a written obligation for money the default admits a liability not to the amt of the demand but for the face of the obligation except so far as it is diminished by indorsmts. i.e. where no motion is made for a hearing in damages. Here the C. ascertains the damages by inspecting the obligation & subtracting the indorsmts. if any

Same rule where the damages are ascertainable by reference to a known standard. As in actions on obligations for collateral articles. Here the Court enquires of the by standard as to the value of the articles the no motion pret sup. / & substract the indorsmts. if any

But if such motion is made after default the Defr. may in St. prove payment not indorsed & denied by Pltff. Sens in Engd (303. Dong /

In Engd there being no motion for a hearing in damages but a jury of enquiry the rule which

A writ of nonsuit without awarding costs is incompletes cam neither be appealed nor recorded - 2 Johns R 8 - Semble when costs are awarded &c. 9

A Pff may enter a nolle to his whole declar - to one count or to a part of a count 1 Bidd 629 1 Saund 207 b.n 7 Johns 120 8 Ac 455 - If a nolle is entered as to the whole costs are allowed - Semble if the nolle is entered to a part only leaving a perfect cause of action for Deft - to answer 4 Ct R 12 - 20 Ch 304

A Nolle as to part entered after jury for the whole is equivalent to a retraxit & a bar to any future action for the same cause 20 C d 302 -

Default.

regulates the amt. of damages on a default are somewhat diff. from ours - There if the damages are presumptive a default admits only a cause of action but on an obligation for money it admits that Defr. is liable for the amt. deducting the indorsmts. arch Ct. 3 H & J 202.

Nonsuit.

If Pff after the return of the writ is guilty of any delays or defaults agt. the rules of Court or of the C. he is adjudged not to pursue his action & becomes nonsuit. Cf If he omit to provide bonds for prosx when ordered by the C. or to give copy of his deed or bond &c. 3 H & J. 295

Pff may also voluntarily suffer a nonsuit before or after defense made by permitting himself to be three times publicly called & not answering but this must be done before the verdict is delivered to the Clerk 1 Root 571.

In these cases Deft. on motion has judgt. per curia whether he has made defense or not - not without motion & motion must be made in the term in which the nonsuit is suffered - Riley 269.

Can Pff. be compelled to submit to a non suit? 10 Ct 191.

A Judge cannot of his own motion direct a non suit 2 Tidd 887. 3 Bl R. 376. 306 L 57

So after nonsuit Pff is in C. for many purposes – 3 Bl R 2 Ld 492

One of several Defts – tho they have served in their plea cannot move for judg.t – as in case of Nonsuit – Lewis where Pff. declares agt. but one 1 Lowen 177 – 2 Bl R 257 Doug 56 – 169 8 John 287 3 Caines 98 If such motion did be granted Pff wd be out of court as to all Defts

In a joint action agt. Servant whether in tort or contract if one dem in his defense puts in a plea which goes to his personal discharge & not to the action Pff. may enter a nolle as to him & proceed against the rest 5 Mend. 228 1 Saund 207. b n 5 Johns 186 3 Lowen 374 20 Johns 106

Nonsuit.

In Engd it is common for the Judges to order Pff to be nonsuit while the cause is on trial if his declarn do not state or his evidence prove a cause of action – but Pff is not obliged to submit to the order on being called he may appear & then the cause must be tried by the Jury 1 Tk 175 b / Case in K B. of Pff returning after nonsuit ordered without any evidence.

After a nonsuit suffered under an order of C. Pff is deemed to be in C for the purpose of moving to set it aside on being cgst bond 2 Tk 1 b. 35 b 3 Dr 2.

Nonsuit never ordered in Ct. After nonsuit Pff may sue again for the same cause 3 Bl 296

III. Retraxit.

Judgt may be rendered agst Pff upon a retraxit either before or after defence made 3 Bl 296.

A Retraxit or withdrawing of the suit is an open & voluntary renunciation of it in C. after a retraxit Pff can not in Engd commence a new

Where all the Defts are necessarily parties of the Pff is obliged to make them so a discontinuance as to some is a discontinuance to all – But where one Deft pleads a plea which does not go to the action the nonsuit or discontinuance may be entered as to him 20 Lilm 122 3 Esp 76 1 Saund 207 n

Nicl 4 Burr 1928 where an Administrator was permitted to withdraw without paying costs –

Retraxit.

suit for the same cause /3 Bl 296./ Dens in Ct. 14 3

A may nonsuit in any stage of the suit in which he may suffer a nonsuit - not after verdict delivered or plaint / nor after a return of arbitrators or auditors nor after the C. has expressed the substance of a decree in Chy tho no bill in form has passed. 1 Root 552 Kirby 273. 47

After retraxit Deft. must move to have judt. for costs or he waives the right & the motion must be made in the same term in which the retraxit is entered. / 1 Kirby 289 / Law of nonsuits

If both parties fail to appear at the return of the writ on being three times called the entry made in our practice is "no appearance" after which the cause is out of C. - no judt. rendered & the suit cannot be revived without consent of parties. If it is like of exceptions may be filed & judt. received Kirby 381.

If both parties having once appeared fail afterwards to appear on being three times publicly

If Pff on trial is nonsuited with the defence of infancy he may discontinue without costs 6 Mod. 302

called a discontinuance is entered & the cause is out of C. 1 Root 149 439.

Defense is made by Deft. plea - 13 Ill 129 / cit to hinds of Pleas, ind Pl. Pl.

Time of Pleading.

By St. Ct. 551. all pleas in abat. nt. in C.C. are to be made heard & determined before the jury is impannelled a jure in every cause joined before that time. Pl. Clerk

This provision has been found impracticable & the rule of the C. now is that they shall be made & tendered only before the rising of the C in the afternoon of the second day Pl. L. Pl. 1 Root 564

In L.C. all original pleas in abatement must be made & tendered or delivered to the Clerk by the opening of the C. P.M. of the 2d day -

Pleas in abatement which go to the merits - as on petitions in Ch. are not within these rules, nor pleas in abatement of writs of error Riley 289.

Time o

Year to the entry in SL are to be made according to the old rule by the opening of the C. in the morning of the 8th day where the term is but one week & of the 4th day where the term is longer Root 5 64

1489

64

This rule has never been strictly regarded in practice & since the new organization of the SL a rule is made in every term as to those causes which are continued for pleading in vacation

Changing & Altering Pleas.

Under our St 552.

whenever Deft supposes that he has misused his plea he shall have liberty to alter it in which case the C. in its discretion may oblige him to pay costs & Pltff is to have a reasonable time allowed for making answer to it & the C. exercise a discretion to a certain extent in allowing the alteration 1 Root 425

But after Deft has pleaded to issue & judgt has been rendered upon it in any C. he cannot demur to the Declarn. Ex Good issue in C.C. appeal to SL Deft cannot

A plea in abatement is not a mere dilatory 5 Mass. 173.
1 Crompt. 127 1 Salkeld 275 2 Atkins 239. T Dunlap 441

Changing and Altering Pleas.

claims in Sl. Kirby 89. So on appeal from Justices to C.P. Ht 552.

But it is a gen^l rule that the Deft. on an appeal may in the same C. apply to change his plea made in the C below of course & without costs – gen^l usage – "Deft changes pleas &c" is the form in this case

He cannot however go back in the order of pleading as from a plea to the action to a dilatory plea for the latter are waived by pleading to the action. PP. PP. nor can he change a plea of title in trespass on appeal – Ht 552.

The rule however in Sl has been as to changing in the C applied to the plea made below that it must be done by the opening of the C in the morning of the 3^d day the term being one week & of the 4th the term being longer Mont 5 84

This rule is never strictly observed & was dispensed with of course in Sl as to causes continued by the rule of pleading in execution – Chute 69.

After demurrer argued & allowed the Court have permitted a discontinuance on payment of costs when there has been a mistake in pleading
2 Sev. 124 141 209 P. 191 1 Saund 89 1 Bid 806
1 Sev 192 298 3. 440 1 Saund 23 Hea 14 116
But now the party may amend on payment of costs 2 Saund 73 n1 – qu B & Bos 10. 1 Ba 107
Doug 113

When a party has omitted to plead the St. Limitations he will not be permitted to amend by adding that plea 2 Mand 294

Changing and Altering Pleas.

1441

The gen. rule supra 70 – as to changing in the C. applied to the plea made below depends upon change.

71

If Dft chooses to rely in the C applies to in the plea made below there is no need of pleading it de novo in the C. ~~below~~ alone

As to the attention of the plea under the St. in the C. in which it was originally made it has been decided that Dft may alter even after trial has begun it seems a new trial for misplead[ing] altho St. says "whensoever" 1 Root 74 404 34 2 Ld 406 2 Ben 227 St. 552 Wm v. St 37 post 73

1

A replication made in Ch to a plea in abatement may be altered in Ch. 1 Root ~~445~~ 301

1

But the C will not allow Dft to alter in any case by making a new plea which is inapplicable to the action. 1 Root 425

Dft has been allowed to alter by pleading to issue after a demurr. argued & the record delivered to the C for judgt 2 Ser. 227. 1 Root 476.

The ~~postponement~~ postponement or continuance of a cause is matter of discretion - but if this discretion is not duly exercised a new trial will be granted. Ex. The absence of a material witness without fault or neglect of the party is good cause of continuance but if refused a new trial will be granted

7 Cowen 284 2 Burr 1513.

Issue and trial.

Denied by Ff that pleas in abatement may be altered. 1 Lev 205

Issue and trial.

Regularly matters of law are to be determined by the C. & matters of fact by the Jury - H. 35.

Questions of law are however involved in issues in fact especially in the gen. issue in our practice

But issues in fact may by agreement of both parties be closed to ~~the~~ Jury & tried by the C Not without such agreement H. 36.

Issues in law are always determined by the C H. 35.

After a trial begun by the Jury C. will not stop the hearing & continue the cause without consent of both parties. 2 Rod 26. 45.

But C. are not on giving the charge to the Jury direct them how to find nor give any opinion the fact or law - but if dissatisfied with their

verdict they may in civil cases return the Jury to a second & third consideration not to alter. H. 36 – Hob. 179 4 Ib.

This may also be done in Eng. but it is not usual as the Judge omits the Jury in the first instance – Stra. 1182.

After the cause is submitted to the Jury no further pleas, argument or evidence can be heard. H. 37. Cite 71

The party who takes the affirmative of the issue in fact first exhibits his evidence & his counsel open & close the argument – 1 Rast 571.

After Deft. has entered upon his defence the Pff having closed his evidence it is sufficiency with the Judge in Eng. to let the Pff in to evidence on a collateral point not before in controversy to turn the verdict against the merits of the principal question or not 1 Rast 604

On issues in law the Counsel for the party taking the exception opens & closes the argument –

On motions & interlocutory ~~[illegible]~~ questions only one counsel can be heard on each side without leave of Ct.

14

By St. 67 only one counsel is allowed to argue a cause unless the demand is above $34 or the title of land is concerned - Rule not much regarded in practice -

If a person is extremely averse Deft to present his testifying the purpose may be defeated if there be no evidence agt. him for the Ct will expunge his name & permit him to testify or if there be some slight evidence agt. him he may on motion be tried first & acquitted testify. Ep 420 Bull 285 1 Root 489 2d 282 420 - Contra 6. Ep 6 Dec. 1817 Brewster Hunter

Cite to Oyer Bills of Exceptions Demurrer to Evidence see in L. 432. 449 488 For challenges to the jury see L. 488 455.

Verdict. This is the finding of the jury on the issue closed to them 3 Bl. 377.

Regularly every issue should be found affirmatively or negatively in the terms of it not suff. for the jury to say that "they find for the Pltff in" or that they find the material fact stated. 1 Root 572.

1 Root 116
2 Do. 282
Cro C. 386
... 580
... 242
3 Bulst. 92

Verdict obtain'd by trick set aside without costs / Burr 353 -

Verdict

Yet if they find in terms the substance of the issue the verdict is good. 1 Day 244

The C. may alter the verdict to make it format where the substance of the issue is good 1 Ld Raym 178. 2 Burr 699

The Constable who waits upon the Jury may not be present while they are deliberating on the cause 1 Root 578 / qu. whether judgt. be arrested for this cause?

For diff. kinds of judgts. see P.L.P. writs of enq. for damages see the titles of the several actions

If the Jury give more damages than are demanded Pff may remit the excess & take judgt. for the rest 1 Root 66 Esp 304 420 4 B & Ald 25 b

Interest when recoverable see "Jury" & to the receiving of damages where there are several Defts. see "Trespass" "Repeated Battery" Esp 537. 420

Courts may remand or supersede exec. on other writs issued improvidentially. Cowp 283.

Where petitioner cites the respondent to appear before the C. he must pay out the lis petitioner is not addressed to the C. / 2 Root 31 /

No costs in Eng. are allowed at Law on a writ of partition or writ of dower / Cooper Pl. 136 2 Pl. 376 Mit. Pl. 111. Bro Ch. 134 2 Dick. 594 / But where the interests are diff. the costs of executing the commission & necessary proceedings in the cause are to be disparged by the parties in proportion to their interests - Cooper Pl. 136 2 Ves Jr. 568 - Centrica Cunl. 236

Where there are several counts in the declaration for the same cause of action & one issue in fact is found on some of them on which Plff recovers he shall have his costs & issue in law on the others on which defdt prevails he shall have no costs 1 Maul & Sel. 27. 2 Burr 1232. 5 East 204. But if for defdt cause of action each recover his costs Ch. Atkins v Hunnington

Costs

Cl. C. L. no costs were allowed to either party but Pff when unsuccessful was amerced pro falso clamore & Deft. when judgt. prayed agst him for the unjust detention of Pffs right. 1 Bac 511 2 Inst 288.

76

Now in Eqd. costs are allowed to the prevailing party in most cases by several Sts. the first of which is that of Glocr. 6 Ed 1. 1 Bac. 511.

In Ct. costs are regularly allowed to the prevailing party in all civil actions Semb. except in 4. cases 1. They are never taxed for Pff in Error on the suit in error. St 2 Ed. "writs of error" 2 Inc 268

2d. when judgt. is arrested for the insufficiency of the detainr. — 3d. If the Deft. in Book debt fail to exhibit his book acct. to be offset agst the Pffs & afterwards brings an action against the Pff. to recover the book debt which he might have exhibited in the former action & prevails he can have no costs unless he shews to the C. that he had no knowledge of the former suit or was inevitably hindered from appearing & exhibiting his acct. Root 572 Rule 218 2 Inc 268. St. 21 Book Debt.

4th. On appeal from Probate to Ct if judgt is disaffirmed for mistake of the Judge no costs — like writ of error lies if mistake is occasioned by fraud or neglect in appellee 1 Root 151.

Where damages are given costs follow without being asked by the Jury 3 Bacon R 81. J D 123

When the parties settle a suit without any agreement respecting costs each pays his own 1 Bacon R 66 5 Johns R 268

Where a cause is discontinued for want of cause the expulsion of costs is a matter in pais & the money may be recovered back 9 Johns 370

A party in interest suing in the name of another will be ordered to pay costs 1 Mass 295 10 Johns 475 2 Cowen 460 5 do 17 –

Costs

Our St. 40 provides that in actions of trespass assault & battery & trespass on the case brot before the Sc or Ccb if the damages found do not amount to £7. Pff shall recover no more costs than damages unless the title inheritance or interest of lands or freehold estate is the principal matter in question or unless the Deft shall have applied to C C or Sc in which case the Pff if he recover judgt shall have full costs 2 Lev 289 2 Root 88 160 to prevent trivial & vexatious suits — Plea of title not necessary to the allowance of full costs 2 Root 88 160

But this St. seems has not been construed to extend to actions on the case founded on contract 12 Lev 218 Grover for exn for £41. Exn delivered to the Pff. after suit brot damages 12/ 2 full costs allowed 1 Root 134 2 Lev 289.

Whenever Deft appeals from a judgt on a plea in abatement & does not support the plea in the C appeals to costs shall be levied agst him up to the judgt on the plea in abatement & exn shall issue for them however the cause shall terminate to his advantage. frivolous exceptions 2 Lev 289 St. 40 & St. 22

After a writ has been abated & amended if Pff obtains final judgt he recovers no costs which accrued before the amendment. except for writ duty & officers fees

77

If Ld. pleads two pleas for one of which verdict is for Pl. judgt. for himself on the other he shall have judgt. for costs on his own – 2 Burr 754

Where one signs a note as surety under a written agreement to save him harmless & he is sued he may recover the costs of such suit of his principal 2 Ward 481

Costs.

Eily 89 2 Ins. 269.

1148

On appeal from Probate to Sh by a minor the decree being affirmed costs were taxed agt the minor — qre should not the costs have been taxed agt the guardian? 78

But on motion in arrest of judgt if repleader is awarded full costs are taxed on the final judgt 1 Root 373.

If in action agt several one Deft obtains a verdict & the Pff prevails agt the others the former is entitled to costs But he can have only one Cttf fee taxed & only his proportion of the C & Jury fees. 1 Root 485.

If two Defts are joined in a suit in which they cannot be joined & prevail costs are taxed for each as supra Semble if the joinder were proper then there would be but one bill of cost taxed & attendance for one only 1 Root 550.

Qre if two or more Pffs recover in a suit only one bill of cost is taxed & travel & attendance for one only

On petition for new trial if the respondent is cited to appear at the term to which the petition is returned & the petition itself is indorsed to the C

If one of several pleas are bad on demurrer to Pff replication the Pff is entitled to have costs on those pleadings. 2 Wh 394 255

If the Court make a rule on payment of costs such rule is conditional & the party obtaining the rule must pay the costs before he can take the benefit of it – Ex Rule to set aside a default 8 Johns 352 Rule to amend 2 Comyns 458 – to set aside a nonsuit 8 Johns 353.

Costs.

at another term the respondent is entitled to costs. He is in C. under the attachment the Petition is not regularly before me C. 2 Root 81. 1490

79

In qui tam prosecutions the Deft. if acquitted is entitled to costs in civil actions. 2 Root 136.

On judgt. by confession the magistrate can tax costs only for his own fee unless there was an antecedent process & if there was the fact must appear upon the record to justify the taxing any antecedent costs or additional costs Kirby 286 1 Sess. 108

Costs are regularly taxed in C by the junior judge tho it is said they may be taxed out of C Kirby 241.

On judgt. on plea in abatement costs are taxed in C.B only up to the second day of the term - for the 4th. provides that such pleas shall be heard & determined by that time.

The atty of the prevailing party has a lien upon the costs & may require the offr holding the exn or the adverse party not to pay them to his client. Cup 584 Denz 226 2 Bl. R 826 2 Bl 440

Pl. shall not be allowed to give additional Oyer of his aut— unless he pray Cost— Stevens v. Beard 5 G & Rd 1818

No costs can be given in any action in which the Court had no jurisdiction 1 Chitt 344 2 Mp 207

Contractors may amend Costs 14 John 162 2 SR 644

Declar.n amended by allowing Pff to declare as surviving partner instead of surviving administrator Amendments will always be permitted where justice will be advanced between the parties 15 L 462

Costs.

But this lien is subject to any equitable claim of the adverse party as a set off. 1 K & B 24. 128 217 457

80

The party commencing is to pay costs at the direction of the C. 1 K 24. 5 b 552.

Ordinary items of cost for Pltff. & Deft — for the mode of setting aside Judgts. and "writs of Error & New trials"

Cost to Eqtt. ied. to the eqtt. Ctr. may remand or supersede exed. or other writs improvidently issued Cauf. 183 4 Bee. 668 Ante

Amendments. Anciently not lost & amendments then allowed before the record was made up were regularly not permitted afterwards except in the term in which the out recorded took place 3 B & 407. 11. 1 Bro. 89 8 Co 156.7 4 Burr 2557 Lawes 1 h. 23

And according to the practice which commenced before the 18th Ed. 1 & contd. a long time not even the slightest & plainest mistake could regularly be altered after the record was enrolled the term passed. 3 B & 410 Lawes 17.

Record is not amendable / 1 Barn. R. 583 / in 3 Cr 586

2 Bos. ~~Pff~~ 294 Pff nonsuited on the ground of a variance - Court set aside the nonsuit & suffered an amendment - 4 Bos 28 after trial an amendment of an informal issue allowed - 3 Taunt 81 Pff nonsuited on the ground of a material variance Court set aside the nonsuit & permitted Pff to amend see also 18 Johns 511

St. LA B. 2. 307 that all original suits in the City County & Superior Courts the declar.n or Petition may be amended at any time within the three first days of the term without cost of such amendment - does not change the nature of the action -

Amendments

At present amendments are more liberally allowed in Eng. than at C.L. & where justice requires it they are permitted at any time while the suit is pending - i.e. before final judgt. not afterwards 3 Bl 407 81

But even including all formal mistakes are indeed aided by the St. Leofails which are numerous the earliest of which is 14th Ed 3. 2 Bl 408 1 Ba 905.

Where Eng. Sts. extend in gen. to artificial & formal not substantial defects or mistakes 8 Co 156. / Ex. False latin false spelling minuta & other formal defects / 1 Ba 97 101. 2. Hob 118 Croke 1144 / Of substantial: during Ept. &c in the delivery of proper signature &c

We have two Sts on this subject the first provides / St 25 p 2 / that no suit pending judgt. or proceeding shall be abated suspended or reversed for any kind of circumstantial errors mistakes or defects if the person & the cause may be rightly understood by the C.

The provision herein is too gen. & vague to admit of any effected application in practice there is abatement & special demurrer for

Where part of Pl's claim is good & part bad & the Jury give entire damages if it appear from the Judge notes that damages were given only on the good count the verdict may be amended 2 John. 61. So in joining a good & bad count if the Judge will certify that the whole evidence applied to the good count verdict may be amended - 1 Caines R 381 ; 5 John R 505. 2, 33 -

If the declaration contain but one count part of the matter alledged being actionable & part not if the Jury find entire damages it will be intended they meant given for the actionable part 2 John R 283. So if part of the promise was made on a good & part on a bad consideration - 2d 442 part 86 n

formal defects are probably as frequent & as unexpected as if no such St. existed

Our old St. 25. provides that when on plea in abatement judgt. is rendered in favor of Deft the Pff. shall have liberty to amend his writ on payment of costs to the time of amendment. - this St extends to formal defects only. -

Decided (Ring 5.h) that a motion to amend under this St. was unnecessary -

By St 2 h the superior Ct. of Law & Eq. may at any time permit the parties to amend any defect mistake or informality in the writ declaration pleading or other parts of the record in civil actions upon payment of costs at the discretion of the Ct. This St. differs from the old in several particulars - 1st - Under this St. motion to amend is necessary "Ct. may permit" Law under the old -

2. Under the old St. the writ only was amendable - under the new any part of the record may be.

Amendments.

3 Under the old no amendment could be made till after judgt against Pff on plea in abatement. 3d. but under the new they may be made at any time by Pff. even before Plea made & by either party at any time afterwards

4th. On amendment under the old Pff was obliged absolutely to pay the legal costs - under the new the allowance or call on the cont. of the costs is left open to be discretionary with the C. 1 Root 545

The S.C. however allows the taxable costs against the party amending almost universally - the C.C in Litchfd C very seldom allow any.

5th. Under the old the formal defects only were amendable - but under the new every species of defect may be amended except 1st where the process is wrong nonjudicia or otherwise void - & No certificate of entry heard 2 Dev 205 / 2d where the amendment proposed would change the nature of the action 1 Root 545. 2 Dev 198 274 472 / 3d where the writ is not strictly void the amendment proposed will not aid it. 2 Dev 205 / & insuffict service - post.

Mey Rep 31. Ellis v Clarke N.H.C. Sept 1800 Pff has been allowed to raise the damages demanded in F.C.

The Court will not in their discretion permit amendments to be made which will in effect amount to a permission to bring another action to which otherwise the Deft might plead the St. Lim^n. 1 Cowen 158 2 JR 717 8 6 do 171. 543 7 do 51. 17 Johns 346 18 do 510 512 4 do 483

If there is no difference in this respect between civil & criminal actions, 6 JR 171 - 1 Bac 107 3 Leo 347

Amendm.ts

S.C permitted a declar.n to be amended after judgt upon demurrer that it was insuff. 12 Cock 297 4 Mod 49 50 7 H.R 132 1 Bos. 309 2 P.W 300 Mitf. 15 Doug 204 216 438 Stra 641 8 Mod 376 / Replication amended after verdict

84

Judgt. Ind. Cfs. changed to Special - Fallis v Clarke supra 7 H.R 132.

One of two Defs permitted to amend by striking the name of his Coadjt. Rust 86

Writs of Error misdescribing the C. below amendable before plea - 1 Root 115 551 173

Regularly in Eng. - writs of Error are not amendable - In Ct. a writ of Error is in form an original writ - Semble in Eng - 2 Bac 202 / Com 344 3 Bl. Coll. 21.

After an amendmt. of the writ the Dft - may plead in abatement - do now 2 no as often as they are made - for from the time of amendmt. it is considered as a new writ Rule 56 P.R.P. / But when a party has leave to amend he may amend all amendable defects -

{ An amendment made without leave of court where the pleadings were settled by an authority which the Court held not correct. 3 Ch 188. }

at C. L. in gen. the rule for amendments in the same in penal as in civil or other actions. 1 Ch 358

Amendm.

The record of a trial is not amendable on writ of error unless he has some written minutes by which to make the amendmt. 1 Root 172

1458

So in 1 Root 166 the mistakes of the Clerk cannot be amended after the term is past unless there are written minutes at sess. & terms during the term 1 Root 572

85

Proceedings in Chancy are amendable as at law 1 Root 472. 3 2d 274

Deft allowed to amend his plea after trial begun to the Jury 1 Root 406

The stat. of amendmt. are not extended to criminal prosecutions nor to qui tam actions with pun. 2 Burr 1099 10 Bragg Pal 51 Croke 44 Croke 414 7 Rich 53.

Cit Ch. no difference between amendmts. as to civil & criminal cases 4 Burr 2527.

If the statement of an extrinsic fact will make the writ good it may be amended - thus where the defect in the writ is extrinsic it may be amended if a statement of the matter

Where several breaches are alleged, a discharge pleaded as to part, jury taken as to the residue, yet it seems for the Court will presume the verdict to have been for such breaches only as were not covered by the plea. Page 32

will make it good. by dismissing &c. 1458

But if such statement will not aid the writ it is impossible to amend. by Sheriff's service in fact the the amendment imports good service there no amendment. do & pendency of a former action for the same cause. & see 205

8 b

do if the return of service is insufficient when the fact of service of suff. in fact the writ may be amended by stating the truth

But when the writ is void it is impossible in the nature of the thing to make it good by any alteration. Ex No signature of an magistrate no certificate of entry issued No direction to an offr. &c

In some instances a verdict may be amended by the C. Pl. If on a demurrer containing good & bad counts no evidence is given on the bad & the Jury find a gen. verdict for Pltff it may be amended by the Judge's minutes & entered on those counts only to which the evidence applied / Dana & al. 1 Bos. 329 / Semble if any evidence was given on the bad counts 2 Barnes 478 ante 92 n. § 464

So a mistake by the Clerk in entering the verdict may be amended - Ex. In the damages found Ex. Hea 514 119 Sel 53 1 Ba 181 Ro 112

And a special verdict may be amended - As where a circumstance decided by the C. material already proved is omitted Hea 513 1 Ser 134 1 Ba 101 Sel 478

But in an criminal case a verdict whether gen. or special is said to be amendable Sel 53 Ro 141. Ex. Mod 84 Bang 382

A Judgt by default admits only the transitable matter therefore upon a hearing in damages in an action of assault & Battery the defendt admits merely an assault on some day not the one line in the declarn — nor does it admit matters of aggravation — Pltff must satisfy the trier by proof that defdt committed the particular injury complain^d of 5 Mod. 164

Court will set aside an exd irregularly taken at any time during the term in which the judgt is rendered — 6 G. Mass. 158 Austin v. Austin — 2 Burr 756

A Submission to referees by rule of Court being irrevocable & it being incidental to their power where the rule makes no provision on the subject to adjourn the time & place of trial if either party upon due notice refuse or neglect to attend the referees may proceed in haste — nor can such power of the referees be controulled by an agreement between the parties at the time of the submission 1 Ch. R 498

Prof. H Benton.

R Mill

M. Thayer